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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

3154 S. 798

No. 792

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased,

Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA, AND BRIEF IN SUPPORT THEREOF.

Clarence C. Chilcott,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 792

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased,

Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of Sallie Essary, Executrix of the Estate of William H. Essary, Deceased, for writ of certiorari directed to the Supreme Court of the State of Oklahoma to bring before the Supreme Court the case of *Sallie Essary, Executrix of the Estate of William H. Essary, Deceased, Petitioner,* v. *Frank O. Lowden, James E. Gorman and*

Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; and J. M. Kurn and John G. Lonsdale, Trustees of the Estate of St. Louis-San Francisco Railway Company, a corporation, Respondents, respectfully shows that:

Summary Statement.

This action was for the recovery of damages for the death of petitioner's decedent, William H. Essary, who was killed while in the employ of respondents. The action was brought under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, Sections 1 to 8, 35 Stat. 65, 45 U. S. C. A. 51-59) and the Safety Appliance Act (Act March 2, 1893, c. 196, Sec. 2, 27 Stat. 531, 45 U. S. C. A. Sec. 2) (R. 3-9). A verdict was returned by the jury for respondents which was affirmed by the Supreme Court of Oklahoma upon the theory that the evidence was insufficient to show that the coupler which the switch foreman was unable to operate, and which it is alleged caused decedent's death, was defective, or that the manner in which he operated it had any causal connection with or contributed to the death of decedent (R. 211), or that the failure of said coupler to operate was a proximate cause of decedent's death (R. 211) and that the instructions while conflicting and confusing as a whole sufficiently advised the jury of the applicable principles of law to be applied to the facts as found by them from the evidence (R. 210).

There was no dispute as to the applicability of the Federal Employers' Liability Act, it being admitted in the pleadings (R. 23) and in open court (R. 27) that both decedent and respondents were engaged in interstate commerce at the time of decedent's death and that the rights, duties and liabilities of decedent and respondents were governed by said Act.

Decedent had been employed by respondents, Lowden, et al., and their predecessors for approximately 31 years as a brakeman or switchman (R. 124) and left a widow (petitioner) surviving him (R. 122).

At Clinton, Oklahoma, respondent maintained joint facilities and at the time of decedent's death the crew were employed by respondents, Lowden, et al., and were operating upon the main track of respondents, Kurn, et al. (R. 60-63, 157, 172-173).

Decedent was killed as the switch crew were endeavoring to cut off four cars from a drag of fourteen when the switch foreman gave a back-up signal, a stop signal, and attempted to operate the pin lifter of the coupler which failed to function (uncouple), and the four cars which were to be disconnected and kicked down the main line (R. 63-64, 74-75) stopped, and decedent was caused to fall from the front (north end) of the drag of cars (R. 31-32). The foreman then got up on the pin lifting lever with his feet, put his weight on it and signalled the engineer to give him some slack, which he did, whereupon, the pin was pulled and the coupler opened disconnecting the four cars (R. 63-76, 169-170), which then rolled down over decedent, killing him (R. 33).

In the interest of brevity petitioner does not give a full statement of the facts concerning decedent's death here as they will be fully set forth in her brief hereafter.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 237(b) of the Judicial Code as amended by Act of Congress February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 937 (U. S. C. A., Title 28, Sec. 344) and particularly Sec. 344(b) thereof.

The judgment of affirmance sought to be reviewed was rendered June 10, 1941 (R. 207). A motion for rehearing

was denied September 9, 1941 (R. 212) and petitioner files her petition for writ of certiorari within three months from September 9, 1941.

This action was based upon the laws of the United States, to-wit, the Federal Employers' Liability Act (April 22, 1908, c. 149, Sections 1 to 8, 35 Stat. 65 (45 U. S. C. A. Sections 51 to 58), and the Safety Appliance Act (March 2, 1893, c. 196, Sec. 2, 27 Stat. 531 (45 U. S. C. A. Sec. 2).

The following cases it is believed sustain the jurisdiction of this Court to issue its writ of certiorari: *Chicago, G. W. R. Co.* v. *Basham,* 249 U. S. 146, 39 S. Ct. 213, 63 L. Ed. 534. *N. Y. Central R. Co.* v. *Marcone,* 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892. *Jenkins* v. *Kurn,* 313 U. S. 256, 61 S. Ct. 934, 85 L. Ed. 851. *Swinson* v. *Chicago, St. P. M. & O. Ry. Co.,* 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041.

Questions Presented.

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act and the Safety Appliance Act aforesaid:

1. Was there a violation of the Federal Employers' Liability Act?

2. Was the evidence in this case sufficient to sustain a verdict for petitioner under the Federal Employers' Liability and Safety Appliance Acts?

3. Was there sufficient evidence that the coupler in question was defective?

4. Was there sufficient evidence that the failure of the coupler to function was a contributing cause of decedent's death?

5. Were the instructions under which the case was submitted fundamentally and prejudicially erroneous?

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of Oklahoma erroneously held as a matter of law that there was no evidence of a violation of the Federal Employers' Liability Act and erroneously stated in the opinion that such fact was admitted by petitioner (R. 210), whereas, when the parties are both engaged in interstate transportation and there is a violation of the Safety Appliance Act there is always a violation of the Federal Employers' Liability Act, as the violation of the former Act gives rise to an action under the latter, said violation supplying the gist of the action rather than the negligence of the respondents.

2. The opinion of the Supreme Court of Oklahoma is erroneous in holding that petitioner's evidence was insufficient to sustain a verdict for her. The court wholly failed to appreciate and evaluate her evidence, refers to the testimony of respondents' witnesses as the basis for its holding, ignores the testimony of petitioner's witnesses upon the same subject and the physical facts in the case. The test is not how, in the court's opinion, the preponderance of the evidence lies, but whether it is adequate to go to the jury and whether a jury might base an inference thereon and, if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves.

3. The court erroneously held that the evidence wholly failed to show that the coupler operated by the switch foreman was defective (R. 211), whereas, the uncontradicted evidence for petitioner established that the coupler could not be operated in the usual and ordinary manner and that after the switch foreman attempted two or three times to operate it with his hand, he then climbed upon the car and was required to use his weight by stepping upon the

pin lifter in order to pull the pin and thus uncouple the cars.

4. The court erroneously held, and failed to give effect to the evidence supporting such fact, that there was no evidence that the failure of the coupler to function caused or contributed to decedent's death and erroneously states that it was petitioner's theory that the failure to operate the coupler resulted in a "violent jerk." This was not the case, it being petitioner's theory that the failure of the coupler to function caused the unexpected stopping of the car upon the front end of which decedent was standing, and that as a result thereof he lost his balance and fell in front of the moving cars.

5. The Supreme Court of Oklahoma undoubtedly held, as set out aforesaid, that there was insufficient evidence to take the case to the jury to avoid a review of the instructions given by the court which were thirty-two in number, the giving of which amounted to such plain and fundamental error that petitioner was denied the protection of the Federal Employers' Liability and Safety Appliance Acts.

Instruction No. 8 advised the jury that the Safety Appliance Act required the respondents to furnish couplers which "*cannot*" be uncoupled without the necessity of men going between the ends of the cars, whereas the contrary is the law (R. 188).

Instruction No. 9 erroneously required the jury to find as a condition necessary to recovery that the coupler was defective "*prior*" to the time of decedent's death, whereas, the law only required it to be defective at the time of his death (R. 188-189).

Instruction No. 12 erroneously informed the jury that it was the duty of decedent to exercise "*care*" to discover ex-

traordinary dangers arising from the negligence of his employer, whereas, assumed risk was abolished by the Safety Appliance Act (R. 190).

Instruction No. 14 completely eliminated the Safety Appliance and Federal Employers' Liability Acts from the case and submitted the case to the jury on common law negligence and required as a condition of recovery a finding that decedent be free from contributory negligence and assumed risk (R. 190-191).

Instruction No. 15 informed the jury that decedent assumed all of the ordinary risks of his employment as could have been known to him by the exercise of reasonable prudence and diligence, whereas, the contrary is the law (R. 191).

Instruction No. 21 erroneously submitted the cause of decedent's contributory negligence to the jury, whereas, said defense had been abolished by statute (R. 194).

Instruction No. 10 erroneously informed the jury that the whole "*gist*" of petitioner's cause of action was negligence, whereas, the violation of the Safety Appliance Act was the gist of her action (R. 189).

Instruction No. 17 erroneously informed the jury that decedent "assumed all of the risks and hazards incident to the employment" whereas the contrary is the law (R. 192).

The petition was in two counts and Instructions 11, 12, 14, 16, 18 and 21 were erroneously directed to both counts of the petition indiscriminately and, therefore, constituted plain or fundamental error as to Count I (R. 189-194).

By reason of the holding and judgment of the Supreme Court of Oklahoma petitioner has been denied a right and privilege which she specifically set up and pleaded under the Federal Employers' Liability and Safety Appliance Acts referred to aforesaid.

By reason of the foregoing the state court has decided Federal questions of substance in a way probably not in

accord with the applicable decisions of this Court, and in conflict therewith, and with cases in other State and Federal Courts.

Prayer.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the Seal of this Court directed to the Supreme Court of the State of Oklahoma commanding that court to certify and send to this Court for its review and determination on a day certain therein named a full and complete transcript of the records and proceedings in the case of *Sallie Essary, Executrix of the Estate of William H. Essary, Deceased, Plaintiff in Error,* v. *Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; and J. M. Kurn and John G. Lonsdale, Trustees of the Estate of St. Louis-San Francisco Railway Company, a corporation, Defendants in Error,* No. 29922, to the end that this cause may be reviewed and determined by this Court as provided for in the Statutes of the United States, and that said decree and judgment of the Supreme Court of the State of Oklahoma may be reversed by this Honorable Court and that petitioner be granted a new trial, and for such other and further relief in the premises as to this Honorable Court may seem meet and just.

CLARENCE C. CHILCOTT,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 792

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Supreme Court of Oklahoma in *Sallie Essary, Executrix of the Estate of William H. Essary, Deceased, Plaintiff in Error,* v. *Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; and J. M. Kurn and John G. Lonsdale, Trus-*

tees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, Defendants in Error, is not yet officially reported but was rendered June 10, 1941, and appears at 116 Pac. (2d) 712, and Record 207-212. Petition for rehearing was filed July 8, 1941 (R. 212) and denied September 9, 1941 (R. 212).

Statutory Provisions Sustaining the Jurisdiction.

The jurisdiction of this Court is based upon the Judicial Code, Sec. 237, as amended by the Act of February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 937 (U. S. Code, Title 28, Sec. 344) (Sec. 344(b)) which provides in part as follows:

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which * * * any title, right, privilege or immunity is specifically set up or claimed under any statute of * * * the United States."

Substantiality of the Questions Involved.

Inasmuch as this case involves the questions of the sufficiency of the evidence to sustain a verdict for petitioner and the denial to petitioner of the benefits of the Safety Appliance and Federal Employers' Liability Acts, petitioner believes that substantial Federal questions are involved reviewable upon a writ of certiorari. *New York Central R. Co.* v. *Winfield,* 37 S. Ct. 546-7, 244 U. S. 147-9, 61 L. Ed. 1045-7; *C. G. W. R. Co.* v. *Basham,* 249 U. S. 146, 39 S. Ct. 213, 63 L. Ed. 534; *Zucht* v. *King, et al.,* 260 U. S. 174, 43 S. Ct. Rep. 24, 67 L. Ed. 189.

Statement of the Case.

Petitioner's decedent when killed was a member of a switching crew of respondents (R. 61, 184). The move-

ment being made at the time of decedent's death was on the main Frisco track (R. 31, 62-63, 184). The track thereat extends northeast and southwest (R. 127). There is a switch track for the Clinton Compress which connects with the Frisco main track 1186 feet south of the south edge of the Compress, at which point there is a switch stand (R. 127) where the grade of the track was 1.02 per cent (R. 127), which grade prevailed for 275 feet south of the switch stand (R. 129) and for about 400 or 500 feet north of the switch stand (R. 129). Decedent was killed about 3:30 or 4:00 P. M. (R. 62, 161) November 9, 1937 (R. 172-173). It was raining (R. 62, 158) and decedent was wearing his boots and raincoat (R. 123) such as other railroad men wear (R. 160). There were four members in the switch crew being W. I. Snowden, engineer, Frank Fast, fireman, Evan E. Morgan, switch foreman, and decedent (R. 61).

The engine was headed south and had backed ten loaded cars from Clinton to be placed on the Compress switch track (R. 62, 173). There were four empty Rock Island box cars on this track which had to be moved to make room for the ten cars and the ten cars were coupled to the four empties, all of which were pulled out on the main line and stopped at a point where the last car was about 15 feet south of the switch stand, where Morgan arranged with decedent to stop the four cars they were going to shunt down the main line (R. 62, 166), which it was decedent's duty to do (R. 75, 87-88), while Morgan walked along the west side of the drag about three car lengths where he gave a signal to the engineer to back up, which he did (R. 63), moving back north (R. 167) at a speed of two or three miles per hour (R. 161, 179). When Morgan was opposite the place where the cut was to be made he grabbed the pin lifter, gave the engineer a stop signal and attempted to uncouple the cars (R. 63-64, 74), which is the proper method of uncoupling as the engineer can't stop as quickly

as the switchman can give the signal and pull the pin (R. 75, 96, 107, 109-110) but he could not operate the coupler (R. 63-64, 65) although he tried to do so two or three times (R. 66). He put pressure enough upon it to operate it under ordinary circumstances (R. 65). There was no reason why the coupler should not have worked unless the engineer had previously applied the brake (R. 63-64) without a signal, which was not customary (R. 63-65) and which was not done (R. 73, 179).

Morgan then got up on the car (Ex. 6, R. 70-A), put his weight with his foot on the lever, gave the engineer a signal for some slack (R. 63, 73, 167, 170) and thereupon made the cut.

When the train pulled out of the Compress track they stopped until Morgan gave the engineer a back-up signal when he throwed the engine in reverse (R. 174). At that first stop the cars were banked against the engine (R. 176). When they received the back-up signal the engine started rolling first and was shoving the cars down and the slack don't run out when the engine is rolling back until the brakes are applied, and the slack would not commence to run out in the cars until the engineer applied his brakes (R. 177, 180, 181). The slack starts at the engine and goes from the first to second, to third car, etc., back to the end of the train (R. 182).

While Morgan was walking toward the head end decedent went up the ladder on the east side to the brake wheel on top of the north end of the rear car (R. 31) and fell from it after it had just cleared the frog of the switch (R. 35) which was 81½ feet north of the switch stand (R. 128) according to witness Robinson, or approximately 120 feet north of the switch stand, according to witness Boone (R. 158), at which point his hat and club were found. His body was found 210 feet farther north (R. 158). His boots were off (R. 34) and laying near the body (R. 158). A piece

had been torn from his raincoat and was found hanging in the frog of the switch track (R. 86). Just before he fell he was at the brake (R. 31, 51). Witness Robinson did not notice the cars being disconnected until after the four cars had run over decedent (R. 33), but at the time decedent fell they were all in line with one another (R. 37).

Morgan put pressure enough upon the pin lifter to have operated it with his hand (R. 65) and he tried more than once to so operate it (R. 66). The coupler in question was the only one he had ever found it necessary to use his foot to operate in 44 years' experience (R. 60, 66-67) and he had found it necessary many times before to use his foot in operating the type of coupler in question (R. 66-67). The new types of cars they are building are not equipped with such type of coupler (R. 67).

If the engineer had shut off the engine prior to Morgan's attempt to pull the pin it would not necessarily have prevented him from pulling it but the engineer never stopped the engine prior to Morgan's attempt to pull the pin (R. 73). If the coupler had operated the first time he attempted to operate it the four cars would have rolled away from the train at the same speed at which they were moving when cut off and there would have been no jolt, jar or stop (R. 75, 88, 111-112). Morgan testified that at the time he uncoupled the car with his foot he could not have uncoupled it with his hand even though the engineer had given him slack (R. 76-78).

Morgan testified that the same grade extended from 1500 to 2000 feet north from the switch stand (R. 169) and that after he cut the cars off they rolled on down from 300 to 500 feet and stopped of their own accord (R. 171). He said 300 feet in his report to respondents (R. 163).

Fireman Fast testified the whole train was not hooked up with air when the engineer released the brakes and the engine naturally started back and backed from 2 to 4 car

lengths (R. 180) and the slack would run out when he applied his brakes (R. 181).

Engineer Snowden testified that after they pulled out on the main track he backed up about two car lengths and stopped upon a signal, after which he backed the engine about 6 feet (R. 173, 176), stopped, and the cut was made (R. 173).

The length of a box car is 40 feet (R. 112). The amount of slack between each car (R. 92) is 16 inches and from 7 to 12 feet in 14 cars (R. 83-95). The effect of slack running out in 14 cars would cause a jolt or jar sufficient to throw a man not expecting it off the top (R. 88) and the more cars the greater the jerk (R. 110).

Witness Harrell was acquainted with respondents' track at the point where decedent was killed (R. 95) and testified that if an engine coupled to these 14 cars after pulling out of the switch and starting back to the north and down grade, the slack would be bunched so that a pin could be pulled between any of the cars until the engine stopped again, which would cause the slack to run out and tighten the pins (R. 96). If the pin could not be pulled from one side the train should be stopped and an attempt made to operate the coupling from the other side (R. 97).

If the engineer merely released the brake the engine is so much heavier than the cars that it would roll faster than the cars and push them together, thereby bunching the slack so that there would be sufficient to permit the uncoupling of the cars (R. 98). The slack starts at the first car and runs out at the last car (R. 99).

Howard Dodd testified that when the slack is bunched and sufficient force is put on the pin lifter the cars can be uncoupled if the coupler is in operating condition (R. 106). The engineer can't stop as quickly as a brakeman can give the signal to stop and catch the pin (R. 107). The running out of the slack in 14 cars would be sufficient to jerk a man

off the top (R. 108). Morgan testified that the slack would not run out unless the brakes were applied (R. 65).

Specifications of Error.

1. The court erred in holding that the evidence was insufficient to support a verdict for petitioner under the Federal Employers' Liability and Safety Appliance Acts.

2. The court erred in deciding and holding as a matter of law that the evidence wholly failed to show that the coupler in question was inoperative and therefore defective.

3. The court erred in holding that there was no violation of the Federal Employers' Liability Act and that petitioner conceded there was no violation thereof.

4. The court erred in holding there was no evidence that the failure of the coupler to operate was the proximate cause of decedent falling from the car and that to so hold would result in building inference upon inference, and erroneously overlooked and failed to duly appreciate and give effect to all the evidence upon this point.

5. The court erred in holding that the instructions while conflicting and confusing sufficiently advised the jury of the principles of law to be applied to the facts in the case as found by them from the evidence.

Summary of the Argument.

I.

This Court is not bound by a finding of fact or a mixed finding of fact and law made by a State court when reviewing a State court decision denying a claimed Federal right.

Northern Ry. Co. v. *State of Washington,* 300 U. S. 154, 57 S. Ct. 397, 81 L. Ed. 573;

Norris v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074;

Johnson Oil Co. v. *Oklahoma,* 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238;

Kansas City So. Railway Co. v. *C. H. Albers Comm. Co.,* 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316;

Cresswill v. *Grand Lodge K. of P. of Ga.,* 225 U. S. 246, 56 L. Ed. 1074, 32 S. Ct. 822;

C. M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472, 474, 46 S. Ct. Rep. 564, l. c. 565, 70 L. Ed. 1041;

Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455, 457, 48 S. Ct. 151, l. c. 152, 72 L. Ed. 370;

Western & Atlantic Ry. Co. v. *Hughes,* 278 U. S. 496, 497, 49 S. Ct. 231, 73 L. Ed. 473;

Chesapeake & Ohio v. *Stapleton,* 279 U. S. 585, 49 S. Ct. 442, 73 L. Ed. 861.

II.

It is hornbook law that the evidence showing Morgan's inability to operate the coupler in the usual and ordinary way with his hand, thus making it necessary for him to climb up on the car and put his weight upon the pin lifter is sufficient to show a violation of the Safety Appliance Act.

Delk v. *St. L. & S. F. R. Co.,* 220 U. S. 580, 586, 31 S. Ct. 617, 55 L. Ed. 590, 595.

C. B. & Q. R. Co. v. *U. S.,* 220 U. S. 559, 574, 575, 31 S. Ct. 612, 55 L. Ed. 582;

St. Louis, etc. R. Co. v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061;

C. R. I. & P. v. *Brown,* 229 U. S. 317, 320, 33 S. Ct. 840, 57 L. Ed. 1204;

Minnesota & St. L. R. Co. v. *Gotschall,* 130 Minn. 33, 153 N. W. 120; Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. Ed. 955;

Davis v. *Minneapolis & St. L. R. Co.,* 159 Minn. 802; cert. den. 242 U. S. 650, 37 S. Ct. 243, 61 L. Ed. 545;

Minneapolis, St. P. & St. Ste. M. R. Co., v. *Popplar*, 141 N. W. 798; Aff. 237 U. S. 369, 370, 35 S. Ct. Rep. 609, 59 L. Ed. 1000.

III.

Injury from the violation of the Safety Appliance Act is actionable under the Federal Employers' Liability Act. *S. A. & A. P. Co.* v. *Wagner*, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110. *B. & O.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419, *Moore* v. *C. & O.*, 291 U. S. 205, 54 S. Ct. 402, l. c. 404, 78 L. Ed. 755.

IV.

There was direct testimony of witnesses Harrell and Dodds showing the violation of the Safety Appliance Act was the proximate cause of decedent's death, but aside from this direct testimony the physical facts and the circumstances shown by the evidence were sufficient within themselves to show proximate cause.

V.

While this case was based upon Federal Statutes it was triable under the local rules of practice and procedure in the State courts, *C. & O. R. Co.* v. *De Atley*, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016, *Central Vt. R. Co.* v. *White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, hence the laws of the State of Oklahoma govern in regard to the necessity for and manner of saving exceptions and in the matter of motions for new trial.

Under the laws and decided cases of the State of Oklahoma it is the duty of the judge *sua sponte* to properly instruct the jury, Sec. 359, Oklahoma Statutes 1931, as follows to-wit:

"Fifth. * * *. The court shall give general instructions to the jury, which shall be in writing, and be

numbered, and signed by the judge, if required by either party."

His failure to do so, the first assignment of error in petitioner's motion for new trial and the sixth assignment in her petition in error, were sufficient to preserve the error for review in the Supreme Court of Oklahoma and this Court, *First National Bank of Wetumpka* v. *Nolan,* 59 Okla. 20, *First National Bank of Mounds* v. *Cox,* 83 Okla. 1, and this is true even though the court should give an erroneous instruction offered by the complaining party and not excepted to, *Younger* v. *Blanchard Hardware Co.,* 120 Okla. 279.

The effect of the giving of the instructions complained of completely eliminated the application of the Federal Employers' Liability and Safety Appliance Acts from the case and submitted it to the jury upon the common law and petitioner was thereby deprived of a Federal right, to-wit, the right to have her case submitted to the jury under said Acts.

The jury must consider the instructions as a whole and to enable them so to do the instructions must be consistent and harmonious for if they are inconsistent, inharmonious and irreconcilable, confusion results, and the greater the effort to reconcile the irreconcilable the greater the confusion, and when this irreconcilability, inconsistency and confusion appear in the instructions the judgment must be reversed for the reason that the court is unable to tell which instructions the jury followed and which it ignored, *First National Bank* v. *Nolan,* 59 Okla. 20, 157 Pac. 754.

Argument.

I.

A failure of a coupler to work at any time and under any circumstances is sufficient to sustain a charge that the Act has been violated. This is set forth in the case of *Delk* v. *St. L. & S. F. R. Co.,* 220 U. S. 580, 586, 31 S. Ct. 617,

55 L. Ed. 590, 595, and in the case of *C. B. & Q. R. Co.* v. *U. S.*, 220 U. S. 559, 574, 575, 31 S. Ct. 612, 55 L. Ed. 582, l. c. 588, quoting from the case of *St. Louis, etc. R. Co.* v. *Taylor*, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061, as follows, to-wit:

> "'* * * The obvious purpose of the Legislature was to *supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts.'" * * *

This doctrine was reiterated and affirmed by the Supreme Court in the case of *C. R. I. & P.* v. *Brown*, 229 U. S. 317, 320, 33 S. Ct. 840. l. c. 841, 57 L. Ed. 1204, in the following language:

> "* * *. And the concession is made that in the *Taylor* case, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. Rep. 616, and in *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. Rep. 612, this court settled that the failure of a coupler to work at any time sustains a charge of negligence in this respect, *no matter how slight the pull on the coupling lever.*" * * * (Italics ours).

That a coupler fails to function when in a position so to do is sufficient evidence of its defective character, *Minnesota & St. L. R. Co.* v. *Gotschall*, 130 Minn. 33, 153 N. W. 120; Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. Ed. 955, and in the case of *Davis* v. *Minneapolis & St. L. R. Co.*, 159 Minn. 802; cert. den. 242 U. S. 650, 37 S. Ct. 243, 61 L. Ed. 545, the Supreme Court of the State of Minnesota used the following language in enunciating this principle, l. c. 802:

> "The very fact that a mechanical contrivance fails to work, when a fair attempt is made to operate it in a proper manner, tends to prove either that something is out of order, or else that the contrivance is of faulty design or construction."

In the case of *Minneapolis, St. P. & St. Ste. M. R. Co.* v. *Popplar*, 141 N. W. 798; affirmed 237 U. S. 369, 370, 35 S. Ct. Rep. 609, 59 L. Ed. 1000, the situation was analogous to the one here existing. The injury was received by the decedent, a brakeman, while he was uncoupling a car which was being "kicked" to a siding and recovery was sought because of noncompliance with the Safety Appliance Act. Upon the trial a motion was made for a directed verdict because the evidence failed to show neglect on the part of the railroad company and did establish contributory negligence, which motion was denied.

The testimony showed that decedent, on giving the stop signal, attempted to uncouple the "head" car that was to be left to run of its own momentum on the siding; he tried repeatedly to do this by pulling the coupling pin with the lifter at the end of the next car but without success and then stepping between the two cars, while they were moving at a rate of about four miles an hour, in order to effect the uncoupling by hand, he was run over and killed. The conductor, a witness for the company, who examined the coupling apparatus soon after the accident, testified that it worked with difficulty and that he would have reported it as a bad coupler had it been brought to his attention. It will, therefore, be perceived that the facts as to the condition of the coupler existing in *Popplar's* case also existed herein because Morgan testified he could not manipulate the coupler with his hand (R. 63-64, 65), and, under identical circumstances hereafter referred to, did manipulate it by putting his weight upon the pin lifter with his foot (R. 63, 76, 170). He further testified that on many other

occasions it had been necessary for him to operate this particular type of coupler in like manner (R. 67) and that he did not believe he could have operated it with his hand the second time even after the engineer had given him slack (R. 76-78).

In affirming the judgment in the *Popplar* case the Supreme Court of the United States said, l. c. 609:

> "* * *. Without going into the evidence in detail it is sufficient to say that we find no ground for reversal in the ruling that there was enough to go to the jury upon the question whether, in fact, the coupler was defective." * * *

The evidence shows that after the drag which was pulled out of the Compress switch track the 14 cars were shoved from two to four car lengths before they were stopped the first time (R. 180) and that the engine was moved only 6 feet the second time before the cut was made (R. 173, 176), which petitioner contends is a circumstance in her favor because *if sufficient slack could not be accumulated to enable the cut to be made by shoving the cars from two to four car lengths, certainly sufficient slack for such purpose could not be accumulated by shoving the engine only 6 feet,* because the evidence most favorable to petitioner shows that the amount of slack between two freight cars is 16 inches, and, inasmuch as it is claimed the uncoupling could not be made because the cars were on a stretch on account of absence of slack, due to grade, the same having run out when the first stop was made, therefore, merely moving the engine 6 feet could only accumulate 72 inches of slack, not including the distance the cars would have rolled by gravity (?) before the slack was accumulated by the shoving of the engine, whereas, there would be 160 inches of slack to be accumulated up between the engine and the 11th car (the nearest car of the four to be cut off to the engine)

before there was slack created at the point where the pin was to be pulled.

It, therefore, is demonstrated that the evidence in this case proves conclusively that the failure of the coupler to operate was due to inherent defects and not to absence of slack.

II.

The Court in its opinion states that petitioner conceded there was no evidence of a violation of the Federal Employers' Liability Act. However, this is too broad a statement of her contention because it was not only conceded in the pleadings (R. 23) but stipulated in open court that at the time decedent was killed both he and the respondents were engaged in interstate transportation (R. 27) and, if such was the case, then the violation of the Safety Appliance Act was also a violation of the Federal Employers' Liability Act.

The Federal Employers' Liability Act clearly recognizes that rights of action may arise out of a violation of the Safety Appliance Act and a disregard of the command of the statute is a wrongful act and the right to recover damages is implied. The two statutes are in *pari materia* and the clause in the Federal Employers' Liability Act "due to its negligence" is construed to mean that Congress intended to treat a violation of the Safety Appliance Act as negligence *per se*. Roberts Federal Liability of Carriers, Sec. 783, *San Antonio & A. P. R. Co.* v. *Wagner*, 241 U. S. 476, 36 S. Ct. 621, 60 L. Ed. 1110.

This interpretation is specifically affirmed in the case of *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 69 L. Ed. 419, 45 S. Ct. 169, l. c. 172, in which the Supreme Court of the United States said:

> "That act was passed to promote the safety of employees and is to be read and applied with the federal

> Employers' Liability Act. Under the latter, defendant is liable for any negligence chargeable to it which caused or contributed to cause decedent's death (section 1), and he will not be held guilty of contributory negligence (section 3) or to have assumed the risks of his employment (section 4) if a violation of section 2 of the Boiler Inspection Act contributed to cause his death." * * *

It must, therefore, be perfectly apparent that in this case if the parties were engaged in interstate transportation and the Safety Appliance Act was violated the Federal Employers' Liability Act was also violated, *Moore* v. *C. & O.*, 291 U. S. 205, 54 S. Ct. 402, l. c. 404, 78 L. Ed. 755.

III.

The pertinent evidence upon the question of proximate cause most favorable to petitioner is as follows to-wit:

That it was decedent's duty to go on top of the most northerly car of the drag and get ready to set the brake after Morgan cut off the four cars (R. 75, 87); that while decedent was throwing the switch Morgan walked toward the near end on the west side of the track about three car lengths, giving the engineer a signal to back up (R. 63), during which time the train moved back north at a rate of two or three miles per hour (R. 161, 179); that as the cars came back decedent caught the first car and climbed up the east side of the north end thereof, and was doing something with the brake wheel (R. 36, 51, 52); that when the cars had moved back from two to four car lengths (R. 180) Morgan gave the engineer a stop signal (R. 64) and attempted to cut the four cars off by use of the pin lifter (R. 63, 73) but could not uncouple them (R. 63, 65-66, 78) although he applied enough force ordinarily for that purpose (R. 65) as the engineer stopped the drag (R. 176); that in a very short time after

decedent was seen at the brake wheel he was seen falling from the top of the car (R. 31-32, 51) at which time the cars were still "all in line" (R. 37); that the length of a box car is around 40 feet (R. 112); that the engineer then received a back-up signal from Morgan and backed the engine about 6 feet further (R. 174, 176) when he received a stop signal and applied the brakes and stopped the drag the second time (R. 170), and the cars were cut off (R. 167); that Morgan had to climb upon the car and put his weight on the pin lifter before he could operate the coupler (R. 63, 76, 170); that Morgan then threw the switch and signalled the engineer to back on the Compress track (R. 99); that thereafter the engineer saw decedent's body, after the four cars which had been cut off had run over it, and signalled Morgan (R. 162, 165); that a piece of decedent's raincoat was found hanging in the frog of the switch (R. 86); that the distance from the switch stand to the frog was 81½ feet (R. 128); that witness Robinson testified decedent fell from the car just after it had cleared the frog of the switch (R. 35) north of the switch stand (R. 128); that witness Boone testified the first place he saw any evidence of where decedent had fallen was where the chat on the roadbed appeared to have been disturbed 120 feet north of the Compress switch, at which point he found decedent's hat and switch club (R. 157-158); that his body was found 210 feet further north (R. 158); that his boots were off (R. 34) and laying near the body (R. 158); that if the coupler had functioned the first time Morgan tried to operate it by jerking the pin lifter two or three times, the cut would have been made and the four cars would have rolled away from the train when the engine stopped, at the same speed at which they were moving at the time they were cut off, and there would have been no jolt, jar or stop (R. 75, 88, 111-112); that if the engineer merely released the brake the engine is so much

heavier than the cars it would roll faster than the cars and push them together, thereby bunching the slack so that there would be sufficient slack to permit the uncoupling of the cars (R. 98); that the slack would start at the first car and run out the rear car as soon as the engine stopped; that it does not run out simultaneously but from car to car causing some jar to the first car and getting greater until the rear car is reached where it would cause a jerk even though the train was barely moving; that this is shown by impactographs which are used to determine how rough switchmen handle cars (R. 99-100), and that such a jerk is sufficient to throw a man not expecting it from the top of a car (R. 88, 108, 111), and that while a switchman was jerking the pin lifter two or three times and climbing on the car to put his weight on it with his foot the drag would move 50 or 60 feet (R. 112).

Petitioner was not absolutely bound by witness Morgan's testimony in regard to there being no jerk or jar when the train was stopped, *Baldassare* v. *Penn. R. Co.*, 24 Fed. (2d) 201 (C. C. A. 6); *Perryman* v. *Mo. Pac.*, 31 S. W. (2d) 4; *Vanausdol* v. *Bank of Odessa*, 5 S. W. (2d) 109; *Woodward* v. *So. Pac. Co.*, 94 Pac. (2d) 1028, l. c. 1034, and the testimony of witnesses Harrell and Dodds that when the slack ran out of the string of cars after the engine had stopped there would be a jerk or a jar is substantial testimony of such fact and not to be disregarded, *Preston* v. *Western Union*, 250 Fed. 480; Aff. 254 Fed. 229; cert. den. 248 U. S. 585, 63 L. Ed. 433, 39 S. Ct. 182; *Cropper* v. *Titanium Pigment Co.* (C. C. A. 8), 47 Fed. (2d) 1038, 78 A. L. R. 737. Note: 78 A. L. R. 755, 22 C. J. 639, Sec. 733, page 728, Sec. 823, 11 R. C. L. 574, Sec. 7, page 584, Sec. 14, page 586, Sec. 16. 1 Wigmore on Evidence 1081, Sec. 673, 4 Wigmore 115, 116, Sections 1920, 1921.

Evidence must be viewed in a light most favorable to plaintiff on a motion for a directed verdict, *Wade* v. *C.*

& O. R. Co., 14 Fed. (2d) 90 (CCA 4). *Falstaff Brewing Ass'n* v. *Thompson*, 101 Fed. 301; cert. den. 59 S. Ct. 834, 307 U. S. 631, 83 L. ed. 1514, and an adversary's evidence may be used so far as it supports plaintiff, *Alpine Forwarding Co.* v. *Penn. R. Co.*, 60 Fed. (2d) 734; cert. den. 53 S. Ct. 93, 387 U. S. 647, 77 L. ed. 559.

Proximate cause and causation under the Federal Employers' Liability Act are questions of fact and should not be withdrawn from the jury if reasonable men might reach different conclusions from the evidence, *Southern Pac. R. Co.* v. *Ralston*, 67 Fed. (2d) 958 (CCA 10); *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 474, 24 L. ed. 256.

The Federal rule defining proximate cause and its application to facts is laid down in the case of *Milwaukee & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469, l.c. 476, 24 L. ed. 256, and is as follows, to-wit:

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. Scott *v.* Shepherd (Squib case), 2 W. Bl., 892. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act

not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. *In such case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary result, and self operating, which produced the injury.* Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the new circumstances existing at the time." (Italics ours).

This rule has been strictly adhered to by the Supreme Court of the United States and in the case of *Insurance Co.* v. *Boone*, 95 U. S. 130, 24 L. ed. 395, the Supreme Court of the United States said:

> "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

It is only where, under the evidence, reasonable minds could draw but one conclusion that the question of proximate cause ever becomes a question of law, *Montgomery Ward & Co.* v. *Snuggins*, 103 Fed. (2d) 458; *Egan Chevrolet Co.* v. *Brunner*, 102 Fed. (2d) 373, l.c. 377; *Pitcairn* v. *Brandies*, 87 Fed. (2d) 928, l.c. 929; cert. den. 301 U. S. 706, 81 L. ed. 1460, 57 S. Ct. 939; see also *So. Pac.* v. *Ralston*, 62 Fed. (2d) 1026, 67 Fed. (2d) 958.

If the evidence is such that a jury might base an inference upon it and if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves, *Norfolk & W. Ry. Co.* v. *Hawser*, 211 Fed. 567, l.c. 571; cert. den. 231 U. S. 749, 58 L. ed. 465, 34 S. Ct. 321; *Washington Gas L. Co.* v. *Landsden*, 172 U. S. 534, 19 S. Ct. 296, 43 L. ed. 543; *Marande* v. *T. & P. R. Co.*, 184 U. S. 173, 22 S. Ct. 340, 46 L. ed. 487.

On appeal from a judgment entered after directed verdict all facts that the evidence reasonably tended to prove and all inferences that reasonably might be drawn therefrom will be assumed to have been established, *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. ed. 720; *Lumber Co.* v. *U. S.*, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 491; *Clay County C. Co.* v. *Home L. Ins. Co. of N. Y.*, 113 Fed. (2d) 856, 859, and

the weight of uncontradicted evidence and the creditability of witnesses are questions for the determination of the jury, *Clay County C. Co.* v. *Home L. Ins. Co. of N. Y.*, 113 Fed. (2d) 856, l.c. 859; *Elzig* v. *Gudwangen*, 91 Fed. (2d) 434.

It is only where the evidence is so overwhelming on one side as to preclude an opportunity for reasonable minds to differ that the court should direct a verdict, *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. ed. 720; *So. Pac. Co.* v. *Poole*, 160 U. S. 438, 16 S. Ct. 338, 40 L. ed. 485; *Clay County C. Co.* v. *Home L. Ins. Co. of N. Y.*, 113 Fed. (2d) 856, 859. The rule that uncontradicted evidence must be accepted as true does not apply where there is something in other evidence, or in the tale itself furnishing a basis for discrediting it, or for fixing fault in defendant it seeks to exonerate, *Gibson* v. *So. Pac.*, 67 Fed. (2d) 758; cert. den. 291 U. S. 637, 54 S. Ct. 458, 78 L. ed. 1062.

It is only when the facts are clearly settled and but one inference is possible to be drawn therefrom that the question of proximate cause becomes one of law, *Donegan* v. *B. & N. Y. R. Co.*, 165 Fed. 869, l.c. 871, 872.

However, the law of proximate cause has been relaxed under the Federal Employers' Liability and Safety Appliance Acts. Roberts Federal Liability of Carriers, Vol. 2, 2d Edition, p. 1703:

> "* * * The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus determined the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term

> is understood in the act, liability of the employer shall follow, irrespective of the other factors causally related to the injury. He may not escape liability for injury 'resulting in whole or in part from' his negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.' "

In the case of *N. Y. Central R. Co.* v. *Brown*, 63 Fed. (2d) 657; cert. den. 290 U. S. 634, 78 L. ed. 551, 54 S. Ct. 52, while a crew was attempting to couple a switch engine to a refrigerator car an automatic coupler on the latter failed to "make" and the impact started it moving down grade toward a tunnel of the defendant. Seeing the car start the plaintiff, realizing that unless it could be stopped at once it might cause injury, attempted to board the same for the purpose of applying the brake wheel on top of the car. He mounted the side of the car, and, in hurrying to reach for the brake wheel, brushed an overhead electric third rail, from which he received a shock which caused him to fall to the ground and sustain serious injuries, and the question arose as to whether or not the failure of the appliance on the refrigerator car, or the close proximity of the third rail, was the proximate cause of his injury, and the court in deciding that the defective coupler was the proximate cause said, l.c. 658:

> "But it has long been settled that the chain of causation is not broken by an intervening act which is a normal reaction to the stimulus of a situation created by negligence, and such normal reaction has been held to include the instinct toward self-preservation, Scott *v.* Shepard, 2 W. Bl. 892 (the lighted squib case), and the equally natural impulse to rush to others' assistance in emergency, Wagner *v.* International Railway

Co. (Cardozo, C. J.), 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (the danger invites rescue doctrine). This rule of causation has been repeatedly recognized by this court. Sandri *v.* Byram (C. C. A.) 30 F. (2d) 784, 786; Erie Railroad Co. *v.* Caldwell (C. C. A.) 264 F. 947."

The test of whether there is a causal connection between the alleged negligence and the injury is whether the facts show that absent the negligent act the injury would not have occurred, *P. & R. Co.* v. *Auchenbach,* 16 F. (2d) 550, 551; cert. den. 273 U. S. 761, 47 S. Ct. 476, 71 L. Ed. 878. *Spokane & Inland Empire R. Co.* v. *Campbell,* 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125.

Applying this principle to the facts in evidence herein where it is shown that the train was moving back at a speed from two to three miles per hour, that decedent was upon the far end thereof, that Morgan gave a stop signal, that the engine stopped the train, that the coupler failed to operate uncoupling the cars when Morgan attempted to pull the pin, and the decedent fell between the rails of the track within the distance the cars moved (from 2 to 4 car lengths) between the time Morgan gave a come-ahead signal to the engineer and a stop signal, it is conclusive that decedent lost his balance and fell from the top of the car to the road-bed. NO INTERVENING CAUSE WAS SHOWN. There was not a scintilla of evidence in the record from which it could be inferred that anything else caused the death of decedent than that he fell from the car as the result of the unexpected stopping of the four cars when the coupler failed to function. The cases in which the facts are analogous are legion and we desire to call the court's attention to a few of them, and figments of the imagination, conjecture and speculation as to things which might have caused decedent to fall are not to be considered.

The opinion suggests several things which might have caused decedent to fall, but there was no evidence thereof and, in the absence of direct testimony, the simple suggestion of theories does not reduce the jury to mere speculation and disqualify it from determining the cause of the injury complained of, *Wabash Screen Door Co.* v. *Black* (C. C. A. 6), 126 F. 721, 725. See, also, *Roebuck & Co.* v. *Peterson* (C. C. A. 8) 76 F. (2d) 243. *Reading Co.* v. *Geary* (C. C. A. 4), 47 F. (2d) 142, 145, 79 A. L. R. 226. *Perkins* v. *Northern Pac. Ry. Co.* (C. C. A. 9), 199 F. 712, 715. *Railway Express Agency* v. *Little* (C. C. A. 3), 50 F. (2d) 59, 75 A. L. R. 963. *Chesapeake & O. Ry. Co.* v. *Cowley* (C. C. A. 4), 166 F. 283, 284.

The court takes judicial notice of the laws of physics and they will not be ignored. *Rome Ry. & Light Co.* v. *Keel*, 60 S. E. 468. *Marande* v. *Texas & Pac. R. Co.*, 184 U. S. 173, 46 L. Ed. 487, 22 S. Ct. 340. *United States* v. *Joergenson*, 66 F. (2d) 292. *United States* v. *McCreary*, 61 F. (2d) 804. *United States* v. *Kerr*, 61 F. (2d) 800, this being true then the law of inertia applies to the relationship existing between decedent, the car upon which he was riding and the movement thereof. Inertia is defined in Webster's International Dictionary as being "that property of matter by which it tends when at rest to remain so, and when in motion to continue in motion, and in the same straight line or direction in which it is moving, unless acted upon by some external force." Hence in the case at bar we have the box car with decedent upon the far end thereof moving at the speed referred to in evidence, at which decedent expected it would continue until overcome by a force which he himself intended to apply by use of the hand brake. He would, therefore, not be expecting any stoppage of the car or himself. However, when Morgan gave the engineer the stop signal and the engineer stopped the drag and Morgan attempted to pull the pin and the coupler did not

open, the relationship existing between the inertia of the box car and the inertia of decedent was destroyed by the stopping of the box car and the continuing of decedent in the line of movement already started, thereby upsetting the equilibrium of decedent and causing him to lose his balance and fall from the end of the car. As decided in the case of *C. R. I. & P.* v. *Ward*, 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 430, the failure of the switchman to pull the pin, causing the cars to stop, was actionable negligence, whereas, herein, the violation of the Safety Appliance Act by reason of the inoperative coupler constituted a violation of law for which respondents would be liable and therefore would be substituted for the actionable negligence in the *Ward* case.

It is, therefore, conclusively shown that a failure of the coupler to operate caused the car upon which decedent was riding to be stopped and decedent to be thrown therefrom and that such failure was the proximate cause thereof.

The rule prohibiting the accumulation of inferences is applied when necessary to guard against attenuated reasoning as where an initial inference is drawn from a fact and other inferences are built solely and cumulatively upon the first so that the conclusion reached is too remote and has no sound logical foundation in fact. However, the underlying question is whether the conclusion hypothesized can fairly be drawn from the proven facts by reasonably intelligent minds, 1 Jones on Evidence, Civil Cases, 4th Ed. Sec. 137, p. 238. The logical process involved cannot be governed by an inflexible rule. It is not the law which furnishes the test of relevancy, 1 Greenleaf on Evidence, 16th Ed. Sec. 14, p. 36. Sometimes courts hold rather summarily that circumstances taken as a whole support an inference of liability without inquiring critically into the reasoning by which that conclusion is reached. Sometimes also it is said the same fact raises several concurrent infer-

ences, thus avoiding the objection that they are piled. It is well settled that any number of inferences may be drawn in a given case so long as each has a factual foundation. The doctrine has often been assailed or limited in particular cases, 1 Greenleaf on Evidence, 16th Ed. Sec. 14, p. 36, 37; Wigmore on Evidence, 2d Ed. Sec. 41, p. 258; 1 Jones Commentaries on Evidence, 2d Ed. Sec. 11, p. 22; 20 Am. Jur., Sec. 165, p. 169, 95 A. L. R. p. 162, 182, Note. And while a jury may not guess or conjecture as to possible explanation to account for a result, yet it may draw inferences from circumstances contemporaneous with or surrounding the occurrence, *N. & W. Ry. Co.* v. *Hauser*, 211 Fed. 567; cert. den. 231 U. S. 749, 34 S. Ct. 321, 58 L. Ed. 465; *Baltimore & P. Ry. Co.* v. *Landringham*, 191 U. S. 461, 24 S. Ct. 137, 48 L. Ed. 262.

This question was before the Circuit Court of Appeals for the 8th Circuit in the case of *Falstaff Brewing Corp.* v. *Thompson*, 101 F. (2d) 301, and the court in enunciating the rule to be applied said, l.c. 305:

> "It is also argued that the fact that the red panel truck bore defendant's name is used as the basis of three presumptions: first, that ownership of defendant is presumed, second, that it was driven by an employee of defendants, and, third, that he was then engaged in the business of defendant; and hence, that there was a pyramiding of presumptions, contrary to the rule to the effect that one presumption can not be based upon another presumption. It is, however, permissible to draw several conclusions or presumptions of fact from the same state of facts or circumstances. But however that may be, there is evidence that the truck could not have been operated at the time except by a driver of defendant on defendant's business. We have already referred to this testimony. It is perfectly proper that a series of facts and circumstances be used as the basis for ultimate findings or inferences. We conclude that

the court properly denied defendant's motion for a directed verdict."

The opinion is not clear as to just what inference is piled upon another inference. The facts in the case show that the coupler did not operate, from which it states an inference may be drawn that it was defective. It then states that the jury must further infer that the defect in the coupler caused a jerk or jar of the car upon which decedent was standing, but such an inference is unnecessary because we have the expert testimony of witnesses Dodd and Harrell that such a stop would cause a jerk or a jar at the end car when the slack run out, which is substantial evidence, as shown heretofore. However, we do have the positive evidence that the cars stopped. We have the positive evidence that Essary fell from the cars and petitioner will hereafter show that it is not necessary where there is a violation of the Safety Appliance Act, or even only a violation of the Federal Employers' Liability Act, that a jerk or jar be shown before liability attaches. It is only necessary that there be negligence in the unexpected stopping of the cars sufficient to cause a man thereon to lose his balance and fall. Certainly, in this case there is a chain of causation running directly from the failure of the coupler to operate to the death of decedent.

There are many cases in the books where liability rested wholly upon the circumstances attending the death of a person with no eye witness at all, and we will cite the Court a few of such cases. In the case of *Choctaw* v. *McDade*, 191 U. S. 64, 48 L. Ed. 96, 24 S. Ct. 24, the evidence showed that McDade was a brakeman and was killed while discharging his duties and at his post of duty, and when last seen was transmitting a signal from the conductor to the engineer to run past the station of Goodwin, Arkansas, which was passed at a speed of from 20 to 25 miles an hour.

At Goodwin there was a water tank, having attached thereto an iron spout which when not in use hung at an angle from the side of the tank. Shortly after passing Goodwin, McDade was missed, and, upon a search being instituted, his lantern was found near the place on the car where he was at the time of giving a signal. His body was found at a distance of about 675 feet beyond the Goodwin tank. There was testimony tending to show from the location of the water spout and the injuries upon the head and person of McDade *that he could have been killed* as the result of being struck by an overhanging water spout; that the car upon which he was riding was wider and higher than the average car, and the court in affirming a judgment in favor of the plaintiff said, l. c. 65, 66:

> "There was no eye witness as to the exact manner of the injury to McDade * * *. While the evidence was circumstantial it was ample, in our opinion, to warrant the submission of this question to the jury under the instructions given."

In the case of *Kulp* v. *The Chicago, St. P. M. & O. R. Co.*, 88 F. (2d) 466, cert. den. 300 U. S. 700, 81 L. Ed. 1355, 57 S. Ct. 930, the decedent was missed about 2:35 in the morning and at 4:00 A. M. his severed body was found partly between the rails about 25 or 26 feet east of the Lindale Bridge and it was contended he had struck the bridge and not a defective warning appliance. There were no eye witnesses and the court in holding the defendant liable said, l. c. 471:

> "Concededly in passing upon a defendant's motion to direct a verdict it is the duty of the court to take the most favorable view of the plaintiff's evidence, and the inferences reasonably and legitimately to be drawn therefrom. Worthington *v.* Elmer (C. C. A. 6), 207 Fed. 306. And where, as here, on the evidence, reasonable men might well find that a man found in a mangled

condition and dead was killed as a result of contact with a defective warning appliance, and it cannot be said that no such conclusion could be reached on the testimony, the question should be submitted to the jury. Paraphrased from Myers *v.* Pittsburgh Coal Company, 233 U. S. 184, 34 S. Ct. 559, 561, 58 L. Ed. 906. In the case just cited, the trial court did submit the case to the jury, and a verdict for plaintiff resulted. The Circuit Court of Appeals (203 Fed. 221), reversed, largely upon what it regarded '*want of definite proof as to the manner in which Myers came to his death,—whether by contact with the wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety.*'

"The Supreme Court reversed the Circuit Court of Appeals, saying: 'In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See Humes *v.* United States, 170 U. S. 210, 18 S. Ct. 602, 42 L. Ed. 1011.' " (Italics ours.)

In the case of *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 34 S. Ct. 559, 58 L. Ed. 906, the facts were that the body of decedent Myers was found at a place where a trolley wire passed over the tracks in the side entry of a mine at a distance of about 5 feet 7½ inches above the rail, making it necessary for one of ordinary height to remain seated in the car or stooped down. The roof of the entry was about 9 feet above the rail at this point. There was no light at this switch nor was the wire guarded in any way. It also appears that because of the ineffective carbons the headlight on the motor car was not burning and had not been burning for several days. The motorman testified that when the headlight was burning he could see objects on the

track clearly at a distance of 25 or 30 feet and that he could stop his car in about 13 feet. The motor car suddenly ran upon something, was stopped, and it was found that Myers had been run over. His body was lying in the middle of the track with his head toward the motor, and his cap upright with the light still burning was laying beside the track. His body was badly torn and mangled before the motor car could be stopped. The trial court submitted the case to a jury which returned a verdict in favor of his wife, which the Circuit Court of Appeals reversed and remanded, and the Supreme Court of the United States in reversing and the Circuit Court of Appeals in affirming the judgment of the District Court, said l. c. 560-561:

> "The opinion of the circuit court of appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death. * * * that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in the trial court. Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, the verdict and judgment of the district court must be affirmed.
>
> "That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came

in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See Humes *v.* United States, 170 U. S. 210, 42 L. Ed. 1011, 18 Sup. Ct. Rep. 602."

It would be an endless task to recite the facts and quote from the number of cases where there were no eye witnesses, the evidence was only circumstantial and much less satisfactory than the evidence in the case at bar. This brief is already too long but for the ready reference of the Court in case it should decide to pursue the subject further, we refer it to the following cases: *Ward* v. *Denver & R. G. R. Co.*, 85 Pac. (2d) 837, where a switchman fell from the top of a car when it was suddenly slowed, and was killed. *Philadelphia & R. R. Co.* v. *Bartsch*, 9 F. (2d) 858, l. c. 859, where decedent, a brakeman, had climbed on the top of a car when the train, on signal came to a stop, lost his balance, fell, and was killed.

Chesapeake & O. R. Co. v. *Smith*, 42 F. (2d) 111, cert. den. 51 S. Ct. 321, where a brakeman was injured when the brakes suddenly were applied and the train stopped.

Thompson v. *Minn. & St. L. Ry. Co.*, 158 N. W. 43, where a conductor signalled a train to stop, which caused decedent to fall therefrom and be killed.

Hurley v. *Ill. Cent. R. Co.*, 157 N. W. 1005, in which decedent was crushed between two cars.

McAllister v. *St. L. Merchants B. R. Ry.*, 25 S. W. (2d) 791, in which decedent's body was found between the rails of a track over which had passed two cars he was supposed to ride and brake.

Meek v. *N. Y. C. & St. L. R. Co.*, 88 S. W. (2d) 333, cert. den. 297 U. S. 722, 56 S. Ct. 668, in which a switchman was found dead shortly after he had been seen attempting to open a coupler.

Williamson v. *St. L. & S. F. R. Co.*, 74 S. W. (2d) 583, in which decedent was found dead shortly after he had been seen to step from the ladder of a car to the ground and walked about 10 feet. *Trusdale* v. *Wheelock*, 74 S. W. (2d) 585, in which decedent's body was found under a car on a railroad track.

Petitioner again urges the case of *C. R. I. & P. R. Co., et al.*, v. *Ward, infra*, upon the attention of the Court, believing that the opinion herein is in conflict with said case. This case was decided by the Supreme Court of Oklahoma and is found at 173 Pac. 212, 252 U. S. 18, 40 S. Ct. Rep. 275, 64 L. Ed. 430. The Supreme Court of the United States in detailing the facts said, l. c. 275:

> "* * *. It appears that at the time of the injury to Ward, the cut of the cars had been pushed up an incline by the engine, over an elevation, and as the cars ran down the track the effect was to cause the slack to run out between them permitting them to pull apart sufficiently to be uncoupled, at which time it was the duty of the engine foreman to uncouple the cars. The testimony tended to support the allegations of the petition as to the negligent manner in which this operation was performed at the time of the injury, showing the failure of the engine foreman to properly cut off the cars at the time he directed the engineer to retard the speed of the engine, thereby causing them to slow down in such manner that when the check reached the car upon which Ward was about to set the brake, he was

suddenly thrown from the top of the car with the resulting injuries for which he brought this action."

And in affirming a judgment for Ward said, l. c. 276:

"Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care, on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the connection. * * *"

The only difference between the *Ward* case and the case at bar is that Ward was precipitated from the end of the car by the sudden slowing due to the negligent failure of the pin puller to uncouple the cars, whereas, in the case at bar decedent was thrown from the end of the car by reason of the violation of the Safety Appliance Act. If anything, the case made by petitioner is stronger than the one made in the *Ward* case.

We further desire to call the court's attention to the case of *Texas & P. R. Co.* v. *Behymer,* 189 U. S. 468, 47 L. Ed. 905, where a brakeman was required to get out on the top of cars when they had snow and ice thereon. While he was upon the cars the engine moved to the main track and stopped suddenly and the cars ran forward to the extent of the slack and back again, as they were moving *up hill*, which upset Behymer's balance, the bottom of his trousers caught

in a projecting nail on the running board and he was thrown between the cars, and the Supreme Court of the United States in affirming a judgment in his favor said, l. c. 469:

> "* * *. It is true that the jury might have drawn a different conclusion from his evidence, or have disbelieved it in essential points, but they also were at liberty to find, as they must be taken to have found, that the foregoing statement is true. * * *
>
> "* * *. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454, 27 L. Ed. 605, 2 Sup. Ct. Rep. 932. No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet, it can be avoided, if necessary, *and when the particular and known condition of the train makes a sudden bump, obviously dangerous to those known to be on top of the cars*, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as the train did stop, the risk of it was not assumed by the plaintiff. *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 665, 42 L. Ed. 1188, 1191, 18 Sup. Ct. Rep. 777." (Italics ours).

There was ample evidence that the failure of the coupler to operate was the proximate cause of decedent's death. It is only necessary to apply a little common sense to the physical facts to arrive at such conclusion and the Supreme Court of Oklahoma, therefore, erroneously held there was no evidence of proximate cause.

IV.

Under summary of the argument we showed that errors in the instructions were properly preserved for review by the Oklahoma Supreme Court and this Court. However, inasmuch as the Supreme Court of Oklahoma assumed

that such questions were sufficiently presented and proceeded to decide that the instructions were not prejudicially erroneous such questions were sufficiently raised, *N. C. R. Co.* v. *Zachary,* 231 U. S. 248, 257, 34 S. Ct. 305, 58 L. Ed. 591. *Miedreich* v. *Lauenstein,* 232 U. S. 236, 34 S. Ct. 309, 58 L. Ed. 584.

Instruction No. 8.

Instruction No. 8 (R. 188) informed the jury the law was directly contrary to what it is, *S. A. & A. P.* v. *Wagner,* 166 S. W. 24; Aff. 36 S. Ct. 626, 241 U. S. 476, 60 L. Ed. 1110. This was reversible error, *N. O. & N. E. R. Co.* v. *Scarlett, et al.,* 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752.

Instruction No. 9.

Instruction No. 9 (R. 188-189) required the jury to find that the coupler was defective "*prior to the time of the accident*". This was reversible error as the Safety Appliance Act has been violated if the coupler fails to work at any time and under any circumstances, *Delk* v. *St. L. & S. F. R. Co.,* 220 U. S. 580, 586, 31 S. Ct. 617, 55 L. Ed. 590, 595, and in the case of *C. B. & Q. R. Co.* v. *U. S.,* 220 U. S. 559, 574, 575, 31 S. Ct. 612, 55 L. Ed. 582, l. c. 588, quoting from the case of *St. Louis, etc., R. Co.* v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061.

Instructions No. 12, 15, and 17.

Instructions No. 12 (R. 190), 15 (R. 191) and 17 (R. 192) informed the jury that it was the duty of decedent to "*exercise care to discover extraordinary dangers that might arise from the negligence of the employer or those for whose conduct the employer is responsible.*"

This is not the law and it was, therefore, reversible error to give such instructions, *C. & O.* v. *De Atley,* 241 U. S. 310,

36 S. Ct. 564, 60 L. ed. 1016. *C. R. I. & P.* v. *Ward,* 68 Okla. 201; Aff. 225 U. S. 18, 40 S. Ct. 275, 64 L. ed. 430.

Instruction No. 14.

Instruction No. 14 (R. 190-191) submitted the case and directed a verdict for respondents upon common law negligence, wholly ignoring the application of the Federal Employers' Liability and Safety Appliance Acts. This instruction is as follows:

> "You are further instructed that among the non-assignable duties of the defendants to the deceased was the duty *to use ordinary care to furnish him with a reasonably safe place to perform the duties of his employment, and reasonably safe means, instruments and appliances,* with which *to perform his duties, and to use ordinary care to maintain them in that condition so that as far as might be by proper care on his own part,* the employee would be enabled to perform his duties in safety to himself. If the defendants failed to properly discharge any of the duties to the deceased in so far as they are covered by the allegations of *negligence* in this case and by reason of such neglect or failure of the defendants, the deceased was killed, *while using ordinary care himself,* and in line of his duty and when he did not assume the risks, then the defendants would be liable and your verdict should be for the plaintiff. If the defendants performed their duty to the deceased, *as above indicated,* or if the deceased was himself wanting in ordinary care for his own safety *which was the sole cause of his death,* or if the deceased had assumed the risks, in either case, you should find for the defendants." (Italics ours).

The giving of this instruction was plain, fundamental and reversible error and precluded petitioner from recovering under the Acts aforesaid, Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531 (Title 45, U.S.C.A. Sec. 2), Act of April 22,

1908, c. 149, Sections 1, 3 and 4, 35 Stat. 65 (45 U.S.C.A. Sections 51, 53 and 54). See Appendix A.

The test of a coupler is its operating efficiency and a failure to function at any time sustains a charge the statute was violated, no matter how slight the pull on the coupling lever, *A. C. Ry. Co.* v. *Parker,* 242 U. S. 56, 59, 37 S. Ct. l.c. 70, 61 L. ed. 150. *C. B. & Q.* v. *U. S.,* 220 U. S. 559, 575, 31 S. Ct. 612, 55 L. Ed. 582, 588. *C. R. I. & P.* v. *Brown,* 229 U. S. 317, 320, 33 S. Ct. 840, l.c. 841, 57 L. ed. 1204. *St. L. I. M. & S.* v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616, 52 L. ed. 1061. *M-K-T R. Co.* v. *Herron,* 176 Okla. 162, l.c. 166.

Where a coupler fails to function such fact is sufficient evidence of its defective character regardless of how it functioned before or after such failure, *M. & St. L.* v. *Gotschall,* 130 Minn. 33, 153 N. W. 120, Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. ed. 955. *Vigor* v. *C. & O.,* 101 F. (2d) 865, cert. den. 58 S. Ct. 1031. *M-K-T R. Co.* v. *Herron,* 176 Okla. 162, l.c. 166.

The Safety Appliance Act extends to every part of the couplers necessary for their operation, *M. St. P. & S. S. M. Ry. Co.* v. *Goneau,* 198 N. W. 403, 269 U. S. 406, 46 S. Ct. 129, 68 L. ed. 1089. *So. Pac.* v. *Thomas,* 188 Pac. 268, 269, 21 Ariz. 355; cert. den. 255 U. S. 576, 41 S. Ct. 447, 65 L. ed. 793.

The Safety Appliance Act extends its protection to employees other than those engaged in coupling or uncoupling operations, *L. & N.* v. *Layton,* 234 U. S. 617, 621, 37 S. Ct. 456, 61 L. ed. 931. *M. & St. L.* v. *Gotschall,* 130 Minn. 33, 153 N. W. 120; Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. ed. 955. *C. & O.* v. *Vigor,* 101 F. (2d) 865; cert. den. 58 S. Ct. 1031.

When the violation of the Safety Appliance Act contributes to the injury or death of an employee, assumption of the risk is not a defense, Act of April 22, 1908, c. 149, Sec. 4, 35 Stat. 66, Sec. 54, Title 45, U.S.C.A. *Carter* v. *C. R. I. & P.,* 179 Okla. 292, l.c. 294.

Contributory negligence is not a defense under the Federal Employers' Liability Act, but merely diminishes the damages in proportion to the amount of negligence attributable to the employee unless the violation of the Safety Appliance Act contributes to the employee's injury or death, in which case no employee shall be held to have been guilty of contributory negligence, Act of April 22, 1908, c. 149, Sec. 3, 35 Stat. 66, Sec. 53, Title 45, U.S.C.A. *C. R. I. & P.* v. *King,* 165 Okla. 169, l.c. 177.

Even if the Safety Appliance Act is complied with, yet if the carrier operates the cars so that the appliances cannot be used without doing what the statute seeks to avoid, the statute is violated as fully as if the carrier had failed to install the appliances, *Johnson* v. *So. Pac.,* 196 U. S. 1, 25 S. Ct. 58, 49 L. ed. 363. *U. S.* v. *Ill. Cent. R. Co.,* 177 Fed. 801, 101 CCA 15. *Hohenleitner* v. *So. Pac.,* 177 Fed. 796. *Noel* v. *Q. O. & K. C. R. Co.,* 182 S. W. 787. *Christie* v. *Wabash,* 191 S. W. 241.

It will, therefore, be seen that where employment in interstate commerce and the violation of the Safety Appliance Act concur, contributory negligence is abolished for all purposes and assumption of the risk is no defense. *Grand Trunk Western R. Co.* v. *Lindsay,* 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 835. *S. A. & A. P. R. Co.* v. *Wagner,* 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110. *T. & P.* v. *Rigsby,* 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874. *Carter* v. *Chicago, R. I. & P. R. Co.,* 179 Okla. 292.

It is difficult to imagine more error being crammed into a single instruction in a case of this character.

Instructions Nos. 11, 12, 13, 14, 15, 16, 18 and 21

Instructions 11 (R. 188-189), 12 (R. 190), 14 (R. 190-191), 15 (R. 191), 16 (R. 191-192) and 21 (R. 194), erroneously applied indiscriminately to both counts of the petition and,

therefore, constituted fundamental and reversible error, 64 Corpus Juris 601, 757. *Batson* v. *Alexander City Bank*, 60 So. 313, l.c. 316. *Ratti* v. *P. Berry & Sons, Inc., et al.*, 119 Atl. 894, l.c. 895. *Sunderland* v. *Fireproof Construction Co.*, 78 Ill. App. 102, l.c. 104. *Chicago & Alton R. Co.* v. *Eselin*, 86 Ill. App. 94. *Dudley* v. *Penn. R. Co.*, 153 Ill. App. 619, l.c. 624. *Mantonya* v. *Wilbur L. Co.*, 251 Ill. App. 364, l.c. 370.

The aforesaid instructions given by the court were so inapplicable, conflicting, contradictory and confusing that no one could understand their application.

To misdirect the jury as to the applicable law or as to upon whom the burden of proof rests is fundamental and reversible error, *New Orleans & N. E. R. Co.* v. *Harris*, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167. *Yazoo & M. V. R. Co.* v. *Mullins*, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754. *New Orleans & N. E.* v. *Scarlett*, 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752. *Eagle-Picher* v. *Layton*, 182 Okla. 405.

There was no evidence in the record of either contributory negligence or assumed risk.

Conclusion.

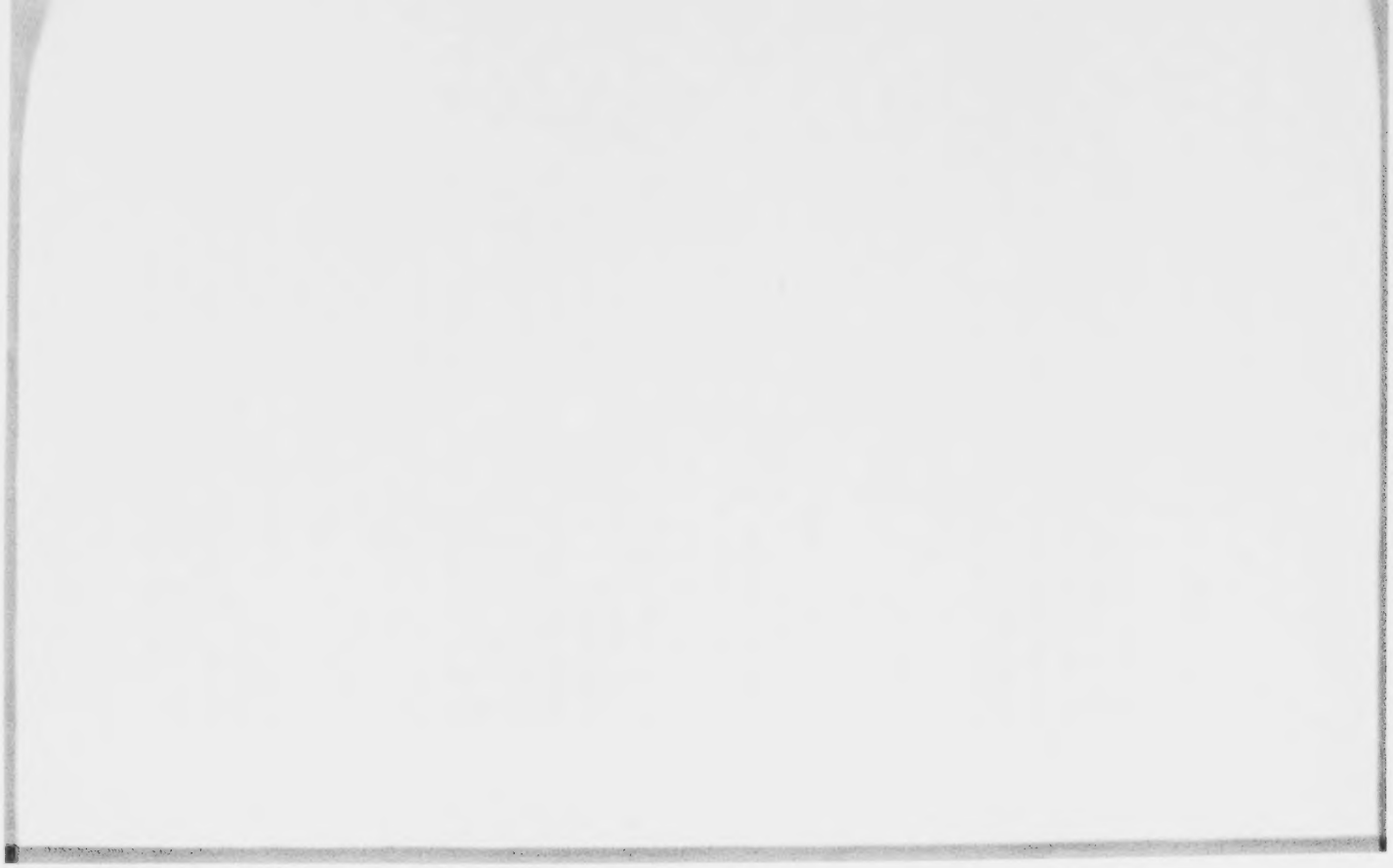
In view of the decisions of this Court construing the Federal Employers' Liability and Safety Appliance Acts, the action of the Supreme Court of Oklahoma is not understandable and it is a travesty on justice for the Supreme Court of Oklahoma to deny petitioner a new trial and not permit her to submit her case to a jury under proper instructions. The Supreme Court of Oklahoma permitted a recovery in the case of *Ward* v. *C. R. I. & P.*, 68 Okla. 91, 173 Pac. 212; Aff. 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 43, as shown aforesaid, and by its action has denied petitioner the right to recover under even more favorable circumstances. Certainly such inconsistencies in the law as are shown herein to exist between the present case and the cases

cited *supra* should be supervised and controlled by this Court. Petitioner should not be denied justice regardless of the substantial matters with which this Court has been occupied in the last few years. Petitioner is entitled to a construction of the laws which were enacted for the benefit of a great and underprivileged class and should not be deprived of the benefit of said laws because perchance the Supreme Court of the United States has no time to pass upon a just and meritorious case. Every Federal Employers' Liability case of which this Court has taken jurisdiction since the case of *Minn. S. P. & S. S. M. R. Co.* v. *Borum*, 286 U. S. 447, 52 S. Ct. 612, decided May 23, 1932, but one (*G. N. Ry. Co.* v. *Leonidas*, 303 U. S. 1, 59 S. Ct. 51) has been reversed. There has been only one case arising under the Federal Employers' Liability Act in which this Court has written an opinion in nearly four years.

The fact that all of the cases of which this Court has taken jurisdiction in nearly ten years have been reversed is some evidence of the need to exercise the supervisory power of this Court to the end that inferior courts will recognize and give effect to the beneficial provisions of the Act referred to and that justice be dispensed where justice is due and the benefits of the Act be not lost by such a distorted construction as is presented in the present case.

Respectfully submitted,

CLARENCE C. CHILCOTT,
Attorney for Petitioner.



APPENDIX A.

Safety Appliance Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531:

Sec. 2. *Automatic couplers.*—It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Federal Employers' Liability Act of April 22, 1908, c. 149, Sections 1-3-4, 35 Stat. 65, being Sections 51, 53 and 54 respectively, Title 45, U. S. C. A:

Sec. 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.*—Every common carrier by railroad while engaging in commence between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 53. *Contributory negligence; diminution of damages.*—In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have re-

sulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 54. *Assumption of risks of employment.*—In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(12)

No. 782

Supreme Court of the United States

October Term, 1941

SALLIE ESSARY, Executrix of the Estate of
William H. Essary, Deceased,
Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island & Pacific Railway Company, a corporation; AND C. [illegible] AND JOHN G. LONSDALE, Trustees of the Estate of [illegible] San Francisco Railway Company, a corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENTS IN OPPOSITION

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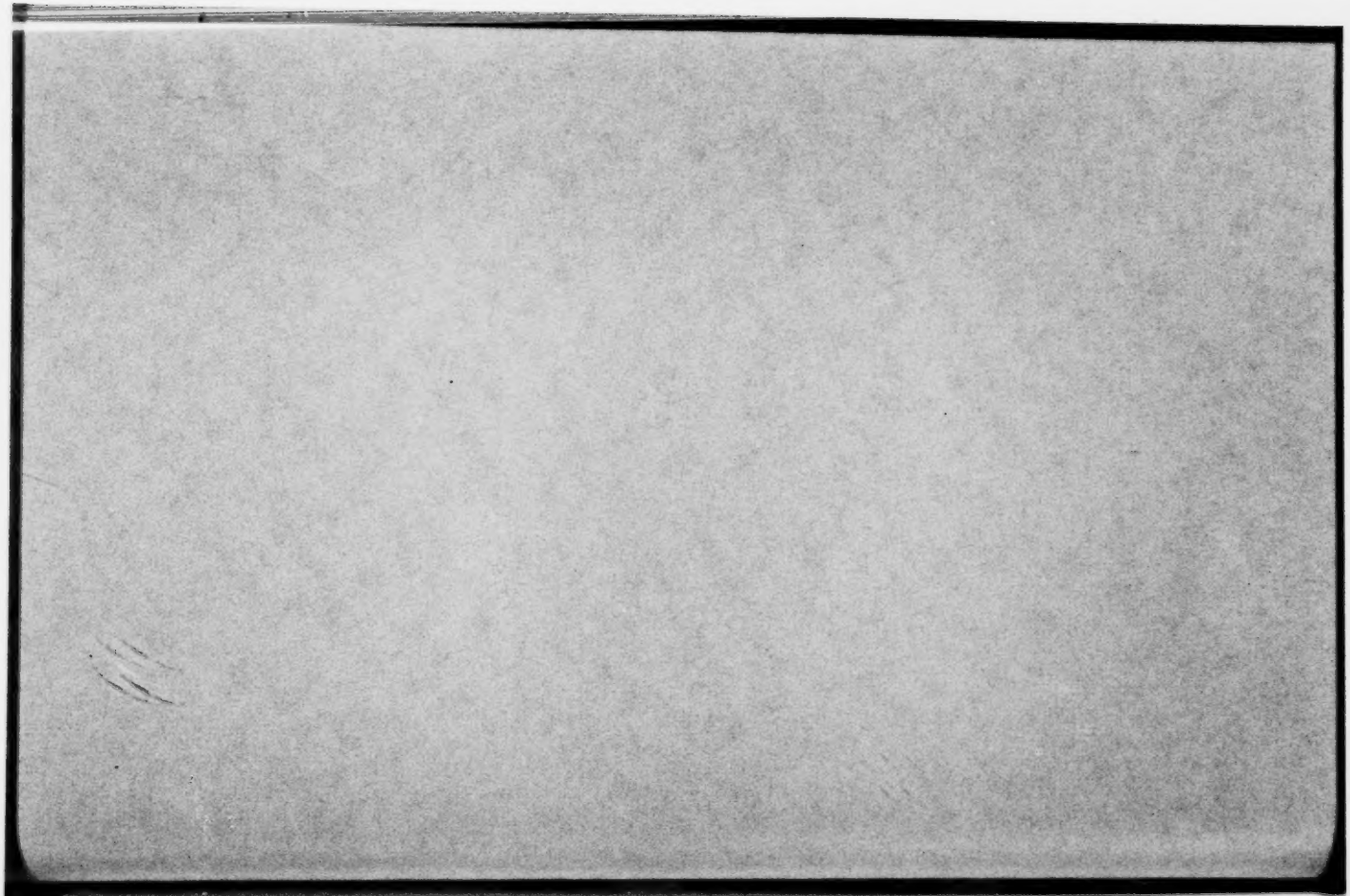

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Supreme Court of the United States

October Term, 1941

No. 792

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased,
Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; AND J. M. KURN AND JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENTS IN OPPOSITION

This is respondents brief opposing the petition of the petitioner for writ of certiorari directed to the Supreme Court of the State of Oklahoma to bring before the Supreme Court for review the above entitled cause.

The pleadings are contained in the Transcript at Pages 1-26, thereof.

ISSUES OF FACT

The negligence alleged by plaintiff is set out in two causes of action. Her first cause of action alleges that defendants' negligence consists of the violation of the Safety Appliance Act of the Congress of the United States in that the automatic coupler which was used to cut off these four cars was defective and would not work, and that the defective condition of the coupler was the proximate cause of the injury.

In the second count of the petition the plaintiff alleges that the other members of the train crew were guilty of negligence in the handling of the train; that the train crew, including the engineer, caused said train while traveling in a backward movement to be jerked in such a violent manner that the deceased was thrown from the top of the train to the ground between the rails and said cars were allowed to run upon and over him, causing his immediate death.

The answers of the defendants consist of a general denial and defendants further plead contributory negligence and assumption of risk.

All of these issues were duly submitted to the jury upon the evidence and a general verdict in favor of the defendants and against the plaintiff was returned.

The plaintiff appealed to the Supreme Court of Oklahoma and the verdict and judgment of the trial court was affirmed. The opinion of that court is set out at Pages 208-212 of the Transcript.

PETITIONER'S CONTENTIONS SUPPORTING HER PETITION FOR WRIT OF CERTIORARI

While the petition for a writ of certiorari for review contains the citation of numerous authorities and statements, an analysis of such petition shows that counsel for petitioner urges only two propositions, to-wit:

1. That there is no evidence to support the verdict of the jury and the judgment of the trial court and the Supreme Court of Oklahoma thereon.

2. That the trial court erred in his instructions to the jury.

ARGUMENT AND CITATION OF AUTHORITIES

The burden of proof of negligence of defendants rested upon the plaintiff. The plaintiff alleged in Count 1 of her petition that the defendants violated Section 2, Title 45, *U.S.C.A.*, which reads as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

There was no evidence whatever to support the charge that defendants violated this Section of the Safety Appliance Act. The only witness interrogated by plaintiff concerning the coupler was E. E. Morgan, switch foreman. He testified to no defects in this coupler at all. His testimony begins in the Transcript at Page 60 (Original Record at Page 94). At Page 65 of the Transcript he described to the jury what kind of a coupler he was using; that it was a

Major coupler and was so constructed that it complied with the Safety Appliance Act. It coupled by impact with the car and uncoupled without the necessity of men going between the ends of the cars. He testified that the string of cars were barely moving; that it was a standard automatic coupler that had been approved by the Safety Commission of the Railway Company and the Interstate Commerce Commission. It did not require that the switchmen and brakemen go between the ends of the cars to couple it and plaintiff offered no testimony that this coupler was unsafe or defective in any way; that when E. E. Morgan made his first attempt to pull the pin with the pin lifter the train had run out of slack; that this was due to the fact that the train was on a small grade and it had by its own gravity straightened out the slack. He got hold of the pin lifter with his hand and discovered that the slack was out and the running out of the slack had tightened the pins in all of the train; that he signaled the engineer to give him a little slack and he used his foot and immediately uncoupled the four cars; that the place where Morgan was standing on the ground opposite where the uncoupling was made was a little slanting and at that particular point he could not get enough leverage to pull the pin out without the slack.

Loyd P. Wilson testified, beginning at Page 154 of the Transcript, that this coupler was an American Railway Association type of coupler; that it is the type adopted by all of the railroads in the country and that he inspected it soon after the accident and found no defects about it.

The testimony given by these two witnesses is not even controverted.

On November 9, 1937, the date of the accident, plaintiff's witness, E. J. Robertson, made a statement in writing which appears at Page 135 of the Transcript (Page 202 Original Record). He signed that statement and included in it is the following:

> "The cut of cars went on down the main line to the curve before coming to a stop. I am positive that the cut had already been made when I saw this man fall and that there was a lap of about a car length between this cut of cars and the rest of the cars that the engine had ahold of. The engine and the rest of the other cars were standing still when this man fell. At the time this man fell the cut of cars was going about 5 miles an hour or possibly a little slower. I never did look over the cars to examine them.
>
> "The track at this point is a single line, straight in each direction for several hundred feet, running north and south, and down grade to the north. None of the other men who were standing on the platform or at that end of the compress saw this man fall and did not know anything of it until I told Richard about it and he then told the rest of them. (fol. 210) There was a slow continual rain at the time of the accident. Mr. Essary had on a long heavy rain coat, heavy gum boots, and it seems to me that because of the rain and the gum boots, he slipped while trying to put the brakes on. I had on gum boots at the time and I know that it was hard to walk with them on.
>
> "I am positive that I saw this man fall from the top of this front car and I am also positive that there was a gap of about a car length between the cut he was on and the rest of the cars that the engine had ahold of which had stopped at the time of the accident. I think that I am the only person that saw the accident. It seemed to me that all the movements of the engine and the cars just before the (135) accident were easy, there being no rough handling that I could tell." (136)

At the trial several months later Robertson tried to deny signing this statement and make the impression on the jury that he did not know whether or not the cut of four cars were disconnected from the rest of the train at the time the accident occurred. His testimony at the trial on that point appears at Page 33 of the Transcript (Page 53 Original Record). The evidence conclusively shows by the following witnesses that he did sign it:

G. K. McLaughlin, whose testimony begins at Page 130 of the Transcript (Page 196 Original Record).

E. D. Wallace at Page 152 of the Transcript (Page 227 Original Record).

L. G. Henderson at Page 146 of the Transcript (Page 219 Original Record).

The deceased's connection with this coupler was merely an incident to the switch movement. The deceased did not couple or uncouple the cars. Morgan did that. The deceased, Essary, climbed on top of this cut of four cars clumsily dressed in two pair of pants, boots, jersey sweater, overcoat and a raincoat over his overcoat. Plaintiff offered no evidence that the deceased was on top of the cars when Morgan made the cut.

Also plaintiff offered no evidence even tending to show that there was any rough handling of the train of cars by the train crew in this switch movement. The members of the train crew testified that they were barely moving the train and the slack ran out and that nothing occurred that was unusual in this movement. This testimony of the train crew is not contradicted.

Frank Fast, the engineer on this switch movement, testified at Page 178 of the Transcript (Page 264 Original Record):

"Q. State whether or not in making that movement there, there was any jerking or jumping of these cars with the engine?

A. None at all."

W. T. Snowden, fireman, at Page 172 of the Transcript (256 Original Record) in testifying about the movement of the train was asked:

"Q. Just tell what you did—what was done?

A. We made the first stop, then we back up about, I judge, about six feet and he made the cut. (173)

Q. State whether or not there was any jerk there in that movement?

A. No, sir, there was no jerking at all."

R. W. Boone, agent for the Railway Companies at Clinton, testified that he appeared at the scene of the accident soon after it happened and he was asked:

"Q. Did you have occasion to observe how Mr. Essary was dressed that afternoon as he was working?

A. Yes, sir, he had on two pair of pants, a pair of boots, a shirt and I would say a kind of a jersey sweater, a leather coat and a rain coat.

Q. Have a rain coat on?

A. Yes, sir.

Q. Over his leather coat?

A. Yes, sir, a rubber raincoat."

His testimony on that point is on Page 158 of the Transcript (236 Original Record).

None of the next above testimony was denied or in any way contradicted.

This was a general verdict for defendants. A general verdict finds every material fact in favor of the prevailing party. In the case of *Chicago, Rock Island and Pacific Railway Company* vs. *Richerson*, 185 Okl. 560, 94 Pac. (2d) 934, it is held:

> "A general verdict in favor of the plaintiff and against the defendant was a finding of every material fact necessary to support the general verdict."

And further the Supreme Court of Oklahoma holds:

> "A general verdict finds every material and issuable fact in favor of the prevailing party."

In the case of *National Life & Accident Insurance Company* v. *Ford*, 169 Okl. 102, 36 Pac. (2d) 25, the court held:

> "A judgment based on the verdict of a jury in a law action will not be disturbed by this court on appeal if there is any competent evidence reasonably tending to support the same."

Petitioner's contention that the verdict and judgment are not supported by the evidence is without merit. No witness testified that there was any defect in this coupler, nor that there was any jerking or rough handling of the train at the time of the accident.

A jury verdict will not be disturbed on appeal where there is any evidence reasonably tending to support it. *General American Life Insurance Company* v. *Bryson*, 61 Pac. (2d) 1094, 178 Okl. 142; *Firestone Tire & Rubber Company* vs. *Sheets*, 62 Pac. (2d) 91, 178 Okl. 191; *Pacific Mutual Life Insurance Company of California* vs. *Tetirick*, 68 Pac. (2d) 828, 180 Okl. 307.

INSTRUCTIONS

Petitioner's second contention is that the court committed reversible error in his instructions given to the jury at the trial. The court's instructions appear in full, beginning at Page 185 of the Transcript (Page 282 Original Record). These instructions adequately cover the general issues of the case as to negligence. The jury was also advised that it is alleged that the defendants violated the Safety Appliance Act and the provisions of the Federal Employers' Liability Act of Congress, including the provisions of said Acts with reference to the doctrine of contributory negligence and assumption of risk. Instructions Nos. 22, 23 and 24. Instruction No. 22, among other things contains this provision:

> "Neither contributory negligence nor assumption of risk may be interposed as a defense where an injury is occasioned or proximately caused by a violation of the 'Safety Appliance Act.'"

Instruction No. 23 contains a sentence—

> "* * * A failure of the appliance to work efficiently when properly operated will sustain a charge that the Act has been violated, and render the carrier liable for an injury which results from such failure." (289)

And Instruction No. 24 reads as follows:

> "You are instructed that if you find from the evidence that the coupler failed to work when attempted to be operated by the engine foreman by use of the hand on the lever at the side of the car, for the purpose of uncoupling the cars, and that such failure contributed in whole or in part to cause the death of the deceased, the defendants would be liable in damages." (290)

There was no attempt in these instructions to eliminate the application of the Federal Employers' Liability and

Safety Appliance Acts from the case. The meaning and effect of those Acts was plainly expressed and dealt with in these instructions.

In the case of *Blew, Administrator* vs. *Chicago, Rock Island and Pacific Railway Company*, 177 Okl. 553, 61 Pac. (2d) 258, it is held:

> "Instructions must be considered together, and while an instruction standing alone may be subject to criticism, yet if the instructions when taken in their entirety fairly submit the issues to the jury, reversible error is not committed."

See also—

Grayson et al. vs. *Brown*, 166 Okl. 43, 26 Pac. (2d) 204.

Chicago, R. I. & P. Ry. Company vs. *Kahl*, 168 Okl. 578, 35 Pac. (2d) 731.

St. Louis-San Francisco Ry. Co. vs. *Stuart*, 173 Okl. 221, 47 Pac. (2d) 177.

Skaggs v. *Gypsy Oil Co.*, 169 Okl. 209, 36 Pac. (2d) 865.

At the trial the plaintiff only excepted to Instructions numbered 10, 17, 19, 26 and 27 and only presented in argument to the trial court and the Supreme Court of Oklahoma Instructions numbered 10, 17 and 19. Instructions numbered 26 and 27 were both in plaintiff's favor and were not presented. Counsel for plaintiff took no exceptions to Instructions numbered 8, 9, 11, 12, 13, 14, 15, 16, 18 and 21. He has attacked all of those instructions and took no exceptions to them at the trial, or in his motion for a new trial. His motion for a new trial appears at Page 201 of the Transcript (Page 301 Original Record).

At Page 17 of the petition for writ of certiorari counsel for petitioner with reference to the local rules of practice

and procedure in the Oklahoma State courts makes the following statement:

> "While this case was based upon Federal Statutes it was triable under the local rules of practice and procedure in the State courts, C. & O. R. Co. v. De Atley, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016, Central Vt. R. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, hence the laws of the State of Oklahoma govern in regard to the necessity for and manner of saving exceptions and in the matter of motions for new trial."

We accept his statement in regard to the necessity for and manner of saving exceptions and motions for new trial in State courts in cases otherwise based on Federal statutes. In this connection we call the Court's attention to the fact that the three instructions to which he did except comprise a very small part of the instructions of the court as a whole and these instructions to which he took no exceptions contain all of the vital parts of the instructions as a whole.

It is well settled by rules of practice and procedure and laws of Oklahoma that where a party fails to object to the instructions at the trial of a cause he thereby waives all error. While we do not think these instructions contain any reversible errors, we assert that if there were any errors in these instructions to which plaintiff made no objection in the trial court it has been waived by the plaintiff. In support of this proposition we submit the following authorities:

In the case of *Baker et al.* vs. *Shaw*, 184 Okl. 194, 86 Pac. (2d) 319, it is held: (2d Syl. by Court)

> "The purpose of an exception to an instruction to the jury is to inform the trial judge that it is error to give the same to the jury; and an exception to an in-

struction after the verdict has been returned comes too late."

In the *City of Bristow* vs. *Schmidt et al.*, 170 Okl. 338, 40 Pac. (2d) 656, it is held: (3d Syl. by Court)

"Error cannot be predicated on trial court's rulings on instructions, where rulings were not excepted to at time made."

The case of *Firebaugh* vs. *Dubois*, 70 Okl. 269, 173 Pac. 1126, holds: (1st Syl.)

"This court will not review an instruction given on the trial of a cause, unless the instruction is excepted to at the time it is given."

PROXIMATE CAUSE

The court instructed the jury in instruction No. 9 with reference to the proximate cause of the accident, as follows:

"You are further instructed that it is admitted and stipulated by both parties to this suit that at the time of the accident complained of, the switch engine and crew were engaged in the movement of interstate traffic. By what is known and designated as the 'Safety Appliance Act,' the laws of the United States require that railroads engaged in interstate commerce must have all of their cars equipped with automatic couplers which can be coupled and uncoupled by means of the use of a lever at the side of the cars, without going between the cars.

"If you find from a preponderance of the testimony that the defendants had in use and were switching and hauling a car with an automatic coupler that was defective and out of repair at and immediately prior to the time of the accident, and that the defective condition of such automatic coupler was the contributing proximate cause of the accident and to the death of the deceased, your verdict will be for the plaintiff.

"And before you can return a verdict for the plaintiff based on the allegation that the automatic coupler was defective and out of repair, you must be satisfied by a preponderance of the testimony not only that the automatic coupler was defective or out of repair, but that its defective condition was the direct or proximate contributing cause of the accident as the court has defined that term to you."

No exception was taken by plaintiff to this instruction.

It is well settled that under the provisions of the Federal Employers' Liability Act the violation of the Safety Appliance Act with reference to automatic couplers is not actionable unless the injuries were proximately caused or contributed to by the defective and unworkable condition of the coupler.

The authorities cited in Notes 333 and 334, Section 51, Title 45, *U.S.C.A.*, hold that to recover from a railway company, under the Safety Appliance Act requiring automatic car couplers, for death of an employee, the injuries must have been proximately caused by failure of such coupler. In other words, these cases hold that the proximate contributing cause is one of the necessary elements to establish negligence, and that it applies under the Federal Employers' Liability Act and the Safety Appliance Act in the same way that it applies to common law actions in tort.

In the case of *Vigor* v. *Chesapeake & O. Ry. Co.*, 101 Fed. (2d) 865, the United States Circuit Court of Appeals, Seventh Circuit, holds (1st Syl.):

"To recover from railway company under section of Safety Appliance Act requiring automatic car couplers, for death of freight train brakeman as result of engine tender separating from first car, injuries must

have been proximately caused by failure of such car and tender to couple automatically or impossibility of uncoupling them without going between them. Safety Appliance Act, Section 2, 45 U.S.C.A., Sec. 2."

In the case of *Southern Pac. Co.* v. *Ralston*, 67 Fed. (2d) 958, it is stated in the 2nd and 5th paragraphs of the syllabus, as follows:

"Proximate cause and causation under statute are questions of fact and should not be withdrawn from jury if reasonable men might reach different conclusions from evidence (Federal Employers' Liability Act, Sec. 1 [45 U.S.C.A., Sec. 51]).

* * * * * * * * * * * *

"Whether failure of brakeman to step off locomotive tender when fireman disregarded signal to stop at crossing was sole cause of brakeman's injury in crossing collision with automobile, or whether it contributed to injury, and whether brakeman assumed risk held for jury (Federal Employers' Liability Act, Sec. 1 [45 U.S.C.A., Sec.51])."

In the case of *Chicago, M., St. P. & P. R. Co.* v. *Lineham*, 66 Fed. (2d) 373, the United States Circuit Court of Appeals, Eighth Circuit, lays down the rule on proximate cause in a case of this kind:

"Employer's failure to obey Safety Appliance Act must be proximate cause of injury to employee for latter to recover damages therefor."

In the case of *Peters* v. *Wabash Ry. Co.*, 42 S. W. (2d) 588, the Supreme Court of Missouri, held (4th Syl.):

"Defective coupling must have caused or contributed to cause employee's injury, and not merely have furnished occasion for employee's going into place where injured, in order to make employer liable (Federal Employers' Liability Act, [45 U.S.C.A., Sections

51-59]; Federal Safety Appliance Act, Sec. 2, [45 U.S.C.A., Sec. 2])."

It is only where, under the evidence, reasonable minds could draw but one conclusion that the question of proximate cause ever becomes a question of law. See, *Montgomery Ward & Co.* v. *Snuggins*, 103 Fed. (2d) 458; *Egan Chevrolet Co.* v. *Brunner*, 102 Fed. (2d) 373, l. c. 377; *Pitcairn* v. *Brandies*, 87 Fed. (2d) 928, l. c. 929; cert. den. 301 U. S. 706, 81 L. ed. 1460, 57 S. Ct. 939; see also *So. Pac.* v. *Ralston*, 62 Fed. (2d) 1026, 67 Fed. (2d) 958.

In this case the trial court properly instructed the jury as to the proximate cause of the accident. Under the evidence in this case the court was compelled to instruct on this point. The plaintiff did not object to these instructions, nor did counsel for plaintiff move at any stage in the case for a directed verdict in favor of the plaintiff. Plaintiff did not request the court to give any instructions at all, except a brief instruction on contributory negligence which was covered by the court in another instruction.

The defendants at the close of all testimony requested a directed verdict for defendants but the request was denied.

CONCLUSION

There was no violation of the Safety Appliance Act in connection with the coupler that was used in uncoupling the 4 empty cars from the remainder of the train. This was a standard automatic coupler that had been approved by the Safety Officials of the Railway Company and the Interstate Commerce Commission. It is admitted that it was of standard make and use. It did not require that switchmen

or brakemen go between the ends of the cars to couple or uncouple it, and no one was between the cars when this uncoupling was made. The uncoupling was accomplished by E. E. Morgan, the Switch Foreman, from a position opposite the space between the two cars where the coupler was located. Attached to this coupler is a steel rod that extends out from between the cars called a pin lifter. A train man can either lift the coupling pin with this pin lifter by standing on the ground outside the opening between the ends of the cars and pull the pin by placing his hand upon the projecting pin lifter rod, or by catching hold of the grab iron and putting his left foot in the stirrup on the outside of the car at the end and pushing down on the end of the pin lifter rod with his right foot. It is done either way. In neither way is the operator of the coupler between the ends of the cars. In this case when Morgan made his first attempt to pull the coupling pin with the pin lifter the train had run out of slack. That was due to the fact that the train was on a small grade and it had by its own gravity stretched out the slack. He got hold of the pin lifter with his hand and discovered the slack was out and the running out of the slack had tightened the pins in all of the couplers in the train. The train was barely moving. He signaled the engineer to give him a little slack and immediately used his foot and easily uncoupled the 4 cars immediately. The place where Morgan was standing on the ground opposite where the uncoupling was made was a little slanting and at that particular point he could not get enough leverage to pull the pin out without the slack. In fact he could not have performed this uncoupling with his hand or foot if he had not got the slack. There was nothing unusual about

the movement of the train, or the uncoupling. A similar uncoupling takes place in those yards every day. This coupler safely performs the use that it performed at that time and there is no evidence whatever that it failed to work at any time. The evidence is that it was in safe condition and no evidence that it was ever defective. The deceased's connection with this coupler was merely an incident to the switching movement. The deceased did not couple or uncouple the cars. Morgan did that.

The deceased, Essary, climbed on top of this cut of four cars after they were cut off of the train. He was not on top of them when Morgan pulled the pin. These four cars had rolled a short distance before Essary got on top of them. In the first place there was nothing wrong with the coupler, and in the second place, its alleged condition in nowise affected him. Plaintiff's assertion that defendants violated the Safety Appliance Act in connection with this coupler is simply a frantic effort to try to find some negligence of defendants in this case. Plaintiff's allegations as to the coupler are contained in Count 1 of her petition.

In Count 2 plaintiff complains that deceased's death was caused by the negligence of the train crew in violently jerking and handling the engine and the rest of the train in switching. There is no evidence at all as to negligence of that kind.

There is absolutely no merit in her Count 1 or Count 2. From the very date of this accident the plaintiff has made a diligent search to find negligence on the part of the defendants. All these efforts failed. The amazing thing about the attack on the instructions is that out of all of these instructions the plaintiff at the trial excepted to only five.

There was no error at the trial. The suit is an ordinary action brought under the Federal Employers' Liability Act by a railroad employee for damages alleged to have been caused by the negligence of the defendants in that they failed to furnish a safe coupler, and that the other members of the train crew were guilty of negligence in handling the switching movement. There is nothing unusual about the case insofar as the Federal Acts are concerned. The filing and prosecution of the suit is authorized by Section 51, Title 45, U.S.C.A. The defense of contributory negligence of the plaintiff's decedent is provided for in Section 53 of the same Act. The doctrine of assumption of risk is available to defendants in Section 54 of the same Act. This case was filed and prosecuted under this Act with due regard to the provisions of the Safety Appliance Act contained in Section 2, Title 45, U.S.C.A. All phases of the Safety Appliance Act and the Federal Employers' Liability Act were fully covered in the court's instructions. When those instructions are considered as a whole, and they must be, there is no error therein. The jury returned a general verdict in favor of the defendants. They were instructed in Instruction No. 25 that in case they found for the defendants under the evidence and these instructions their verdict will simply be "We find for the defendants." The plaintiff took no exceptions, nor made any objections to that instruction. This general verdict is a determination in favor of defendants on every litigable issue in this case. It is sustained by the evidence. It is not contrary to law. The effect of the plaintiff's claim is that the court should not have instructed anything at all, except a direction to the jury to return a judgment for the plaintiff. Plaintiff objects to

the instruction concerning contributory negligence and assumption of risk. These defenses were pleaded. No effort was ever made to strike them from the files. The case was tried. The evidence shows that the facts were abundant showing that the deceased assumed the risk and was guilty of contributory negligence. It is well settled that the deceased assumed the customary and ordinary risks of his employment. In this case Mr. Essary was 54 years old at the time of the accident. He climbed on top of this cut of cars dressed in two pair of pants, pair boots, a jersey sweater, an overcoat and a raincoat over his overcoat. Needless to say he was dressed in a bunglesome way. He climbed up the steps and walked to the front end of the front car that was in the cut of cars. No one could say that that kind of employment is not a usual and customary risk and hazard. He assumed those customary and usual risks and hazards in this case. There was no error in these instructions. There was no evidence of any negligence on the part of the defendants, either as to the coupler, or the conduct of the train crew.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

(13)

FILED
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 792.

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased, *Petitioner,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, *Respondents.*

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

SUMMARY OF ARGUMENT.

I.

Respondents state erroneous conclusions, drawn from the evidence, as matters of fact (Abs. p. 4).

II.

Petitioner does not claim there was no evidence to support the verdict but seeks a reversal of the judgment of affirmance by the Supreme Court of Oklahoma because the Supreme Court of Oklahoma erroneously held that there was no necessity to review the instructions because the evidence was wholly insufficient to support a verdict for petitioner.

III.

The evidence referred to in respondents' brief on pages 5 and 6 was impeachment and not substantive evidence and, therefore, a verdict for defendant could not be predicated thereon.

IV.

It is not necessary under the law of the State of Oklahoma to save exceptions to instructions which are fundamentally erroneous.

V.

The respondents evaded the issue in their discussion of the question of proximate cause.

ARGUMENT.

I.

The brief of respondents is merely a most partisan dissertation of "glittering" generalities appertaining to the Federal Safety Appliance and Federal Employers' Liability Acts, with no attempt to apply the principles of those acts to the facts in this case, colored somewhat by a short discussion of the conclusions of respondents as to what the effect of the evidence was, which conclusions are either inadvertently or deliberately distorted.

Not a single complaint is made that petitioner did not truly and accurately set forth the facts in her statement with record page references, and, by their failure to complain thereof, respondents admit the truth of said statement but blandly seek to avoid the effect thereof by setting forth an alleged admittedly *ex parte* statement obtained by a claim agent of respondents Lowden, et al., with the assistance of two other employees of said respondents (who were probably present so that the three could outswear the negro), from a weak and ignorant negro W. P. A. laborer (R. 29, 47, 55, 56, 57, 66, 67, 94, 226), said statement not being in the witness' language but consisting of the conclusions of the claim agent put in narrative form (R. 138, 142). The claim agent attempted to, and we believe he actually did, dictate the verbiage of the statement (R. 55).

The technique of the claim agent was to gradually lead the witness from fact to fiction by interspersing true statements as given him by the witness with figments of his own imagination concerning the same (R. 56), a practice among claim agents with which every experienced practitioner is familiar.

The witness was able to read some of the statement but some of it he could not make out and while he was laboring to decipher it he was being urged by the claim agent to sign without reading it by being informed that the claim agent had put it down like the witness said it; that he, the claim agent, was in a hurry to leave, and for the witness to sign the statement as "I have put down what you said." The claim agent said, "I put down what you said. I am in a hurry, trying to catch a train back to Oklahoma City" * * * and it was very near time for it, and the witness signed the statement without further attempting to read it (R. 56, 57, 58).

Misstatements of the Evidence and Erroneous Conclusions of Respondents.

We first desire to call to the court's attention the misstatements of the evidence and erroneous conclusions appearing in the brief of respondents. For instance, on page 6 thereof, they state:

> "Plaintiff offered no evidence that the deceased was on top of the cars when Morgan made the cut."

However, respondents in the same paragraph of their brief concede that decedent climbed on top of the cars, and petitioner calls the court's attention to the following bits of testimony from Morgan, the switch foreman, to-wit: After they had coupled on to the four cars and pulled them out from the compress switch track, both he and Essary dropped off at the switch and the end of the car stopped about 15 feet past the switch, where Morgan asked Essary if he could "hold them" and Essary said he could ride them and brake them (R. 62, 166). Morgan testified it was Essary's duty to get on

top of the cars and brake them (R. 75) and in the usual and customary way of performing his duties he would have gone on top of them and Morgan knew that under his instructions to Essary and under his line of duty it was Essary's place to be on top of the cars (R. 75, 169).

Of course, no litigant is required to prove all his case by one witness, or by every witness, but Morgan's testimony showed quite conclusively that in the usual, ordinary and customary manner of performing his work Essary would be on top of the car, and the testimony of other witnesses conclusively proved that fact and that he fell from the car (R. 31, 32, 50, 51, 157, 158).

As another instance of the unfairness of respondents in stating the effect of the testimony, we call the court's attention again to page 4 in which the remarkable statement is made in regard to Morgan's testimony:

> "When E. E. Morgan made his first attempt to pull the pin with the pinlifter the train had run out of slack; that this was due to the fact that the train was on a small grade and it had by its own gravity straightened out the slack. He got hold of the pinlifter with his hand and discovered that the slack was out and the running out of the slack had tightened the pins in all of the train."

Significantly no reference is made to the specific record page where this evidence is found, in violation of paragraph 3 of Rule 27 of this court.

No such statement was made. Respondents by the above paragraph have combined slight fact with much fiction as the record will bear witness (R. 63, 67, 71, 75, 76 to 78, inclusive, and pages R. 82 and R. 167.) Morgan was

an hostile witness it was necessary for petitioner to put upon the stand and his efforts to carry water upon both shoulders and avoid the Scylla of a violation of the Safety Appliance Act upon the one hand and the Charybdis of negligence in the operation of the coupler upon the other, necessitated a feat in verbal gymnastics beyond his capacity. He did everything he could to help respondents. He testified both ways at the same time by stating his conclusion to what he thought, perhaps, the engineer did and the fact as to what he, Morgan, did.

The running out of the slack and the sudden stopping of the cars causing decedent to be thrown therefrom could only be caused by the failure to cut off the four cars which the crew were attempting to shunt down the main track. The failure to cut off the four cars could only be caused by a failure of the coupler to function, when operated in the usual and ordinary manner, or by a failure of Morgan to operate the coupler in the usual and ordinary manner, which would require him to synchronize his movements and time the pulling of the pin with reference to his signals, the failure of which would be negligence. *C. R. I. & P.* v. *Ward*, 68 Okla. 201, 225 U. S. 18, 40 S. Ct. 275, 64 L. ed. 430.

The record indicates that Morgan had evidently reflected considerably upon the effect of his testimony and was endeavoring at all times to avoid the pitfalls of Count II of the petition while seeking to escape from those of Count I, so that his testimony finally simmered down to the failure of the coupler to function, when he attempted to operate it in the usual and ordinary manner (R. 63, 64, 65), and his pure supposition that the engineer had applied the brake without signal, thereby

causing the slack to run out and preventing him (Morgan) from pulling the pin (R. 63, 64, 71, 73), was refuted by the testimony of both W. I. Snowden (R. 175-6) and Frank Fast (R. 179) who were in charge of the engine and himself (R. 65, 71, 72, 73, 74).

Of course, petitioner could not recover upon Count II of the petition when the only testimony supporting that count was the mere supposition and the conclusion of Morgan, and even this disappears from the case when he testified that a Major coupling device was the only one he had ever found it necessary to use his foot to operate (R. 66); that he didn't know why the slack had run out (R. 71); that it possibly ran out before he got a chance to pull the pin (R. 72); that even if the engineer did shut the engine off before he pulled the pin that would not necessarily prevent him from pulling it and that the engineer never stopped (R. 72); that he did not know of the engineer doing anything that would cause the slack to run out of the train (R. 72, 73); that almost simultaneously with the giving of the signal he pulled the pin (R. 73); that he did not wait too long after giving the signal to pull the pin (R. 122), and finally that in his opinion he could not have operated the coupler with his hand even after the engineer had given him slack (R. 76).

It appears to petitioner that the evidence of the failure of the coupler to function is so overwhelming and the evidence of negligence so unsatisfactory and meager as to exclude any other hypothesis from the case.

Witness Morgan testified that he took hold of the lever and signalled the engineer to stop, and that there was no reason why the coupler should not have worked

unless the engineer had previously "possibly" applied the brake just enough to take the slack out (R. 63), which the engineer positively testified he did not do (R. 173, 178, 179), and Morgan testified the engineer did not stop without a signal (R. 73). Morgan testified he didn't know of the engineer doing anything that caused the slack to run out (R. 73). He testified he could not have uncoupled the cars the second time with his hand (R. 76). W. I. Snowden testified that they were shoving the cars back; that the slack don't run out when they start to roll back, but only when the engine stopped when the brakes were applied; that the slack would commence to run out when the engine commenced to stop (R. 177).

Frank Fast, the engineer, and W. I. Snowden, the fireman in charge of the engine, testified that the train and no part of it was permitted to roll back without a signal from Morgan; that an engineer never permits this to be done as it is dangerous and against the rules (R. 175, 179); that they started backing up the engine and shoved the cars back from two to four car lengths when he got a signal from Mr. Morgan to stop, whereupon, he applied the brakes (R. 179) and that the slack would not run out after he once started back until he got a signal to slow and applied his brakes (R. 181).

Respondents make the further startling statement that "there was no evidence whatever to support the charge that respondents had violated the Safety Appliance Act," and while it is not necessary that there be a visible defect in the coupler in order to hold the carrier liable, *A. C. R. Co.* v. *Parker*, 242 U. S. 56, 59, 37 S. Ct. 69, l. c. 70, 61 L. Ed. 150, nevertheless, the testimony of Morgan himself that he tried to operate the coupler two or three times and it wouldn't work (R.

66); that this was the only make of coupler he had found it necessary to use his foot in operating (R. 66); that if it is in proper working condition it can be uncoupled by hand (R. 67) and that on many other occasions he had found it necessary to use his foot to uncouple this particular kind of a coupler (R. 67) is ample evidence that there was something wrong with the coupler, and that he could not have operated it with his hands even after the engineer had given him the necessary slack (R. 76).

With regard to the testimony of Morgan concerning the movements of the drag and the effect thereof petitioner calls the court's attention to the fact that Morgan was 10 cars away from the engine and did not know what the engineer did. He was likewise four car lengths from the end of the car from which decedent fell and could not know what took place there and all the time his attention was directed toward the pulling of the pin. The testimony of the engineer and fireman to the effect that there was no slack, that there was no jerk or jar at the end of the drag, is equally mere conjecture and speculation because they were further removed from the cars which would be affected by the presence or absence of slack. A situation of this character existed in the case of *Gulf M. & N. Ry. Co.* v. *Wells,* 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370, in which this court said, l. c. 152-3:

> "* * *, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine. And his opinion that the jerk was unusual and severe as compared with those which he had previously experienced on local freight trains, had no substantial weight; his situation on the ground by the side of the moving train, after his foot had

> turned on the piece of coal and he had gone 'down,' being plainly one in which he could not compare with any accuracy the jerk which he then felt with those he had experienced when riding on freight trains."

II.

No attempt whatever was made by the respondents to meet the issue presented by paragraphs 2 of the "Questions Presented" and "Reasons Relied on for the Allowance of the Writ," and the petitioner's second specification of error in her brief.

The Supreme Court of Oklahoma having held that, as a matter of law, the evidence presented by petitioner was wholly insufficient to sustain a judgment (R. 211), the question presented was whether or not there was sufficient evidence adduced by plaintiff to submit to the jury under proper instructions.

The respondents sidestep this issue and attempt to inject in the case a false issue by stating that petitioner's contention was "that there is no evidence to support the verdict of the jury and the judgment of the trial court and the Supreme Court of Oklahoma thereon" (Brief, p. 3). This question, of course, is not before the court at all and is beside the point. No question is being raised as to the sufficiency of the evidence to support a verdict for respondents. The only question before this court is whether or not there was sufficient evidence to support a verdict for petitioner and whether or not the case should have been submitted under proper instructions. We take it that if respondents had not produced any evidence to sustain the issues upon their part the court still could not have directed a verdict for the petitioner. Petitioner's evidence and the credibility thereof would still have been a jury question.

In order to avoid meeting this issue, discussing the evidence and the applicable law upon this point, and possibly to confuse the court as to the real issues involved, respondents have injected this false issue into the case and it should be disregarded.

III.

Respondents go to great length, pages 4, 5, 6 and 7 of their brief, where a written statement given by plaintiff's witness Robertson is quoted from and refers to the record pages where the testimony of witnesses McLaughlin, Wallace and Henderson are found, which was given in connection with the statement.

The purpose of respondents in thus quoting at length from this statement and referring to the testimony of said witnesses in this proceeding is not clear unless it be for the purpose of diverting attention from the real issues.

Under the laws of the State of Oklahoma this testimony can be used for impeachment purposes only and does not tend to establish the truth of the matters embraced within such contradictory statement as was held in the case of *Baker* v. *J. H. Hudson Drilling Co.*, 300 Pac. 386, l. c. 388, as follows, to-wit:

> "It is the rule that evidence of a prior statement of a witness who is not a party litigant, which is at variance with his testimony at the trial of a cause, only goes to his credibility, and does not tend to establish the truth of the matters embraced in the contradictory statement, and cannot be considered in determining the propriety of a demurrer to the evidence where the case is tried to a jury. * * *"

To the same effect is the case of *Evans* v. *Local Bldg. & Loan Assn.*, 36 Pac. (2d) 895 (Okla. Sup. Ct.). This is also the rule followed in this court. *Southern Ry. Co.* v. *Maggie Gray*, 241 U. S. 333, 36 S. Ct. 558, l. c. 560, 60 L. ed. 1030. Petitioner, therefore, assumes that such matter will be disregarded by the court.

IV.

Again in their discussion of the instructions respondents do not meet the issue. Their argument is beside the point. They take the position that the instructions must be considered together and that the giving of one or more instructions free from error will correct the erroneous instructions given the jury upon fundamental issues. This absurd position results from a poverty of logic and authority with which to argue the matter under discussion.

Respondents quote from page 17 of petitioner's brief to the effect that the case was triable under the local rules of practice and procedure of the State of Oklahoma and then say, brief page 11:

> "It is well settled by rules of practice and procedure and laws of Oklahoma that where a party fails to object to the instructions at the trial of a cause he thereby waives all error."

The above statement does not meet the issue presented by petitioner's Summary of Argument V. All of what was said was not quoted, nor is any comment made or any of the authorities submitted distinguishing the cases which petitioner cited as supporting her position that it was not necessary to save exceptions for a review of instructions which were fundamentally erroneous. Respondents again attempt to sidestep the real issue and

inject a false issue into the case. Respondents' contention that the instructions must be considered as a whole and are sufficient if they fairly submit the issues to the jury when considered in their entirety is not applicable here, and in connection with this argument it is significant that the Supreme Court of Oklahoma did not base its refusal to review the instructions upon the theory that no exceptions were saved to the giving of such instructions.

From a reading of the opinion in the Supreme Court in this regard (R. 210) one could not determine the character of instructions which were given and consequently it could not be determined from the opinion whether or not they were erroneous and this court will not permit a state court to evade the application of the Federal Employers' Liability and Safety Appliance Acts by a wrong analysis of the evidence, misconception of the law, and vague opinion. *Atlantic Coast Line R. Co.* v. *Mims*, 242 U. S. 532, 37 S. Ct. 188, l. c. 189, and the cases cited therein. The cause of action sought to be enforced herein was not recognized at common law. *St. Louis S. F. & Texas R. Co.* v. *Seal*, 229 U. S. 156, 33 S. Ct. 651, l. c. 652, and the cases cited therein. Whether or not the plaintiff has been deprived of a federal right is not to be based upon technical rules and a state court cannot by procedural means deprive a plaintiff or a defendant of the benefit of the Federal Employers' Liability or Safety Appliance Acts. This was held in the case of *Toledo, St. L. & W. R. Co.* v. *Slavin*, 236 U. S. 454, 35 S. Ct. 306, l. c. 307, in which the court said:

> "But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute, the defendant was entitled to

disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.

"* * *. The principle of that decision and others like it is not based upon any technical rule of pleading, but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars. * * *"

It is, therefore, perfectly apparent that a state court by its instructions to the jury cannot deprive the petitioner of a Federal right, yet that is what has been done in this case, and in view of the statement referred to above in the brief of respondents, petitioner feels that it is necessary that the question of saving exceptions in order to render the giving of erroneous instructions reviewable must be further developed in order that the court fully understand petitioner's position.

Not only is it the law of the State of Oklahoma that plain or fundamental error will be reviewed without the saving of exceptions, but such is the general law. The rule is stated in 64 C. J. 957, as follows:

"* * * when the verdict of the jury has been made to turn upon an erroneous charge, and the judgment upon the merits is thus founded on error, the judgment will be reversed, although no exception was taken thereto.

Wyman v. *Erickson*, 28 N. W. 240, 35 Minn. 202; *Gowdey* v. *Robbins*, 38 N. Y. S. 280, 3 App. Div. 353, 3 N. Y. Ann. Cas. 231; *Wright* v. *Cincinnati St. R. Co.*, 9 Ohio Cir. Ct. 503, 6 Ohio Cir. Dec. 159 (aff.

43 N. E. 688, 54 Ohio St. 181, 32 L. R. A. 340); *Beazley* v. *Denson*, 40 Tex. 416; *Hollingsworth* v. *Holshousen*, 17 Tex. 41; *Wetmore* v. *Woodhouse*, 10 Tex. 33.

Erroneous instruction on burden of proof is ground for reversal, although not objected to. *Gowdey* v. *Robbins*, 38 N. Y. S. 280, 3 App. Div. 353, 3 N. Y. Ann. Cas. 231.

Where charge excludes material conclusions to be deduced from the evidence, it is reversible error, although no exceptions are taken thereto. *Stude* v. *Saunders*, 2 Tex. Unrep. Cas. 122."

In the case of *First National Bank of Mounds* v. *Cox*, 83 Okla. 1, the court gave two erroneous instructions which confused the issues in the case and to which no exceptions were saved, l. c. 3, but, nevertheless, the court reviewed the instructions given by the lower court and reversed and remanded the case because of the giving of the erroneous instructions and in doing so quoted with approval a portion of Sec. 53, page 270, 20 R. C. L. l. c. 6, as follows, to-wit:

" 'Omission or Refusal to Instruct. The failure of the trial court to submit to the jury such issues as are necessary to settle the material controversies, or to state the law applicable to a material issue, such as damages, is ground for a new trial.'

Section 54, page 271, 20 R. C. L., reads as follows:

'Objections and Exceptions. An instruction fundamentally wrong, or which has the effect of preventing a verdict for a substantial amount on a cause of action well pleaded and proven, may be assigned as error on a motion for a new trial, even though at the trial the attorney states that he has no exceptions to the charge, but it is otherwise with inaccuracies

> of expression, failure to instruct on every hypothesis, or inadequate treatment of some phase of the controversy. Under the statutes of some states instructions not excepted to, but which appear from the record to have been given or refused are open for consideration, on motion for a new trial.' "

And as its authority for reviewing the erroneous instruction and reversing and remanding the cause when no exceptions had been saved to the instructions at the time they were given, the court quoted from the case of *Snyder* v. *Stribling*, 18 Okla. 168, found at pages 200 to 207, l. c. 6, and this suit in reversing the case said, l. c. 6:

> " 'Appellate courts should see that causes are tried and justice administered according to the forms and requirements of the law and not hesitate to set aside the verdict of a jury or reverse the judgment of a court where there has been such a departure from settled forms or requirements as have apparently endangered and prejudiced the rights of any litigant.' "

In reversing and remanding the case this court said l. c. 6:

> "* * *. While the court, in his third instruction in the instant case, put the issue of menace up to the jury, and wherein he referred to his definition of duress or menace given in his fourth instruction, yet the giving of his instruction No. 5 on the issue raised by the pleadings, in addition to the instruction given on the same issue raised by the evidence, presented two inconsistent theories of law to the jury. To repeat, we hold this to be reversible error.
>
> We have examined the evidence in this case and we find that there is a probability that there was a miscarriage of justice in this case. The issues joined by the evidence in this case put a square issue of

menace to the jury. Both the plaintiff and defendant were entitled to an instruction plain and direct upon this question, with a definition of menace as laid down in the statutes, given either in the language of the statutes or giving the substance thereof. They were entitled to this without having any other issue injected into the case as was done in the instant case by giving of instruction No. 5. * * *."

It is the duty of the trial court to properly instruct the jury upon the decisive issues made by the pleadings and the evidence, *Williams* v. *Otis*, 155 Okla. 173, and this is the law even though the court should give an instruction offered by the complaining party and not excepted to. Such was held by the Supreme Court of Oklahoma in the case of *Younger* v. *Blanchard Hardware Co.*, 120 Okla 279.

In that case the defendant offered three erroneous instructions which the court gave and defendant afterwards complained of those same instructions and sought a reversal because of the error of the court in giving the same and the court in reversing and remanding the case said, l. c. 280-281:

"Plaintiffs contend that if these instructions are in conflict and there is error therein, it was brought about by the act and conduct of the defendants below, and as defendants saved no exceptions to instructions numbered 6, 7, and 8, but prevailed upon the court to give them, defendants are therefore in a very poor situation to complain of the same here.

We cannot accompany counsel along this line of reasoning. Instructions 6, 7, and 8 embodied counsel's conception of the law applicable to the facts in the case and if they were correct they should have been given; if erroneous, they should have been rejected, and it would be an unusual proceeding for counsel to have objected to the giving of instructions sub-

mitted by them. Counsel for defendants did not think instructions 2 and 5 correctly stated the law, and objected to the giving of the same and saved their exceptions. The same is true of counsel for plaintiffs as to instructions 6, 7 and 8, and counsel would be derelict in their duty to their client if they failed to request the court to submit the cause to the jury upon proper instructions.

* * *

The jury determines the facts from the evidence, but must follow the law as given to them by the court, as applying to the facts so found. They are not at liberty to consider one instruction to the exclusion of the balance, but must consider them as a whole. *Badger Oil Co.* v. *Clay,* 83 Okla. 25, 200 Pac. 433; *M. K. & T. Ry. Co.* v. *Lenahan,* 85 Okla. 290, 206 Pac. 233.

If, then, the jury must consider the instructions as a whole, it is axiomatic that, to enable them so to do, the instructions must be consistent and harmonious, for if they are inconsistent, inharmonious and irreconcilable, confusion results, and the greater the effort to reconcile the irreconcilable only results in greater confusion, and when this irreconcilability, inconsistency and confusion appear in the instructions, the judgment must be reversed for the reason that the court is unable to tell which the jury followed and which it ignored. *First National Bank* v. *Nolen,* 59 Okla. 20, 157 Pac. 754."

A reading of the cases cited on pages 11 and 12 of respondents' brief will show their utter inapplicability to the argument advanced as they do not concern fundamentally erroneous instructions. They concern special instructions and incomplete instructions, but not instructions which are fundamentally erroneous on their face as

are the instructions here complained of. In the case of *Mason* v. *McNeal,* .... Okla. ...., 100 Pac. (2d) 451, l. c. 452, 453, this court in dealing with a similar question of fundamental error in the giving of instructions erroneous on their face, said:

> "• • •. But where, as here, no exceptions are saved, the review will be confined to prejudicial error, erroneous statement of fundamental law, appearing upon the face of the instructions. See, also, *Williams* v. *Otis,* 155 Okl. 173, 8 P. (2d) 728."

The question of the necessity of saving an exception where an instruction is fundamentally erroneous, or the requesting of other instructions in such case, is again treated in the case of *Baumgart* v. *Bryant, et al.,* 184 Okl. 531, 88 P. (2d) 635, l. c. 637, 638, in which this court said:

> "• • • A party does not necessarily, in all cases, surrender the right to a review of an erroneous instruction because he has not requested a correct one. On this subject confusion sometimes occurs, and a partial review of some of our decisions will be of some benefit.
>
> "The rule concerning necessity of requests for instructions does *not apply to instructions as to the law applicable to the issues raised by the pleadings and the evidence.* Such has always been the rule in this state. It does apply to certain other instances *other* than the ones hereinafter enumerated. The distinction as to when the rule is applicable and when it is not is stated in *Dunnington* v. *Loeser,* 48 Okl. 636, 149 P. 1161, 150 P. 874, and reannounced in *Hopkins* v. *Stites,* 70 Okl. 177, 173 P. 449, 450, in this language: 'The petition also insists that, inasmuch as the defendant did not request a proper instruction, it is now too late to complain because one was not given.

But we understand the rule to be, if the instruction given is correct, and either party wants the law more fully stated upon the doctrine upon which the court is charging, then, before they can be heard to complain, they must request such instruction as they desire given. *But if the court undertakes to instruct the jury as to the law, and does so incorrectly, this is prejudicial error. Chicago, R. I. & P. R. Co.* v. *Baroni,* 32 Okl. 540, 122 P. 926; *St. Louis & S. F. R. Co.* v. *Crowell,* 33 Okl. 773, 127 P. 1063; *Robinson* v. *McIver, et al.* (Tex. Civ. App.), 23 S. W. 915."

"In that case the rule was announced in the third syllabus: 'If a court undertakes to instruct a jury as to the law and does so incorrectly, such error is not cured or waived by failure to request a proper instruction as to the law.'

"In *Mutual Refining Co.* v. *Union Refining Co.,* 124 Okl. 286, 255 P. 1015, it was held that: 'Whether requested or not, it is the duty of the trial court to state to the jury in its general instructions the law applicable to the issues raised by the pleadings and the evidence adduced upon the trial. Failure to do so constitutes reversible error. * * *.'

"A clear impression of the distinction is gained by comparing *St. Louis & S. F. R. Co.* v. *Crowell,* 33 Okl. 773, 127 P. 1063, 1064, with *Oklahoma Producing & Refining Corp.* v. *Freeman,* 88 Okl. 166, 212 P. 742, 745. In the first case mentioned it is said that '* * * where an instruction is correct *as far as it goes* but it is insisted that, under the facts in the case, additional instructions should have been given on plaintiff in error's theory, a reversal will not be had unless a supplemental instruction is requested embodying such theory,' but, using the language of the Oklahoma Producing & Refining Corp. case: 'Where the court undertakes to instruct a jury as to the law, and does so incorrectly, *such error is not cured or*

waived by the failure to request a proper instruction as to the law. Unquestionably, this is the correct rule if the erroneous instruction is such as is calculated to mislead the jury. * * *.'

"Time and again we have emphasized the foregoing. In *City of Tulsa* v. *Dickson, et al.,* 166 Okl. 206, 26 P. (2d) 920, 931, wherein it was held that the failure of the trial judge to instruct on the particular issues involved was prejudicial error notwithstanding the absence of a request therefor, we said: 'Neither of the parties to the action requested of the court an instruction upon the correct rule of law. We have cases holding that the failure of the appealing party to request correct instructions upon the material issues involved precludes him from complaining of the alleged error of the court in its instructions to the jury upon said issue. *Potts* v. *Zolinger,* 79 Okl. 262, 192 P. 1099. On the other hand, we have held that *the failure of the court to instruct the jury upon some material issue in the case is fundamental error. Jackson* v. *Peddycoart,* 98 Okl. 198, 224 P. 689; *Younger* v. *Blanchard Hardware Co.,* 120 Okl. 279, 251 P. 56; and *McMullen* v. *Holcombe,* 125 Okl. 178, 256 P. 888. There is a distinction between an incorrect instruction and the entire failure to instruct upon an issue.'

"There is no necessity of, nor any attempt at, laying down any all-inclusive rule in the present opinion. Probably among the cases other instances may be found, or other instances may later arise, where a request for an instruction may or may not be necessary in order to preserve ground for review, but, whatever may be said, it is clear from the foregoing authorities that such request is not necessary where (a) the court undertakes to instruct the jury as to the law, and does so incorrectly, or (b) where there is an entire failure to instruct upon a material issue made by the pleadings and the evidence." (Italics ours.)

Again, in the case of *Martin* v. *McCune,* 170 Okl. 196, 39 P. (2d) 978, this court said:

> "This court has many times emphatically announced the rule that it is the duty of the trial court to give upon its own motion a substantially correct and proper instruction as is applicable to the facts and issues joined."

In the case of *Beck* v. *Day,* 62 Pac. (2d) 1014, l. c. 1015, the Supreme Court of Oklahoma held:

> "Where exceptions are not saved to instructions given, this court will review such instructions only for the purpose of determining whether the same are free from fundamental error."

The duty of the trial court in the matter of giving instructions is further explained in *City of Altus* v. *Martin,* 94 Pac. (2d) 1, in which the Supreme Court of Oklahoma said, l. c. 3:

> "As contended by the City, there are a number of our decisions wherein we have said it is the mandatory duty of the trial judge to instruct correctly upon the fundamental issues of law involved upon his own motion. *First National Bank* v. *Cox,* 83 Okl. 1, 200 P. 238. See 64 C. J. 819, sec. 678 and cases under note 35. Our statutes enjoin such duty upon the trial judges. Sec. 359, O. S. 1931, 12 Okl St. Ann. Sec. 577(5). The authorities point out that it is the duty of the parties to submit instructions upon special pleas, defenses, etc."

See also the case of *Earl W. Baker & Co.* v. *City of Hollis,* 36 Pac. (2d) 757, l. c. 760, in which the Supreme Court of Oklahoma in enunciating the Oklahoma rule in regard to fundamental error, quoted from a number of cases as follows, to-wit:

> " 'It is the duty of the trial court, upon its own motion, to properly instruct upon the issues made by the pleadings and the evidence introduced at the trial of the cause, and a failure to do so constitutes fundamental error.' "

The question of the necessity of saving exceptions to the giving of instructions which are fundamentally erroneous was discussed in the case of *Liberty Nat. Bank of Weatherford* v. *Semkoff*, 84 Pac. (2d) 438, in which the Supreme Court of Oklahoma held, l. c. 440:

> "Since the plaintiff did not save exceptions to the instructions given as required by section 360, O. S. 1931, 12 Okl. St. Ann. Sec. 578, we are precluded from reviewing such instructions further than to ascertain whether they are free from fundamental error. *Beck* v. *Day*, 178 Okl. 310, 62 P. 2d 1014; *Pure Oil Co.* v. *Chisholm*, 181 Okl. 618, 75 P. 2d 464; *Jewel Tea Co.* v. *Ransdell*, 180 Okl. 203, 69 P. 2d 69; *Shobe* v. *Sykes*, 169 Okl. 491, 37 P. 2d 908; *Scott* v. *Scott*, 129 Okl. 176, 264 P. 159. We have therefore examined the instructions given by the court merely for the purpose of determining whether or not they are free from fundamental error, and we find that they fail to instruct the jury upon the decisive issues made by the pleadings and the evidence introduced at the trial and are in this respect fundamentally erroneous. See *Guarantee Investment Corp.* v. *Killian*, 180 Okl. 74, 67 P. 2d 939; *Williams* v. *Otis*, 155 Okl. 173, 8 P. 2d 728; *Oklahoma Producing & Refining Corp. of America* v. *Freeman*, 88 Okl. 166, 212 P. 742. On account of the errors above pointed out the cause must be reversed and remanded for a new trial."

This was followed and approved by the Supreme Court of Oklahoma in the case of *Riser, et al.* v. *Herr*, 102 Pac. (2d) 178, l. c. 180.

From the above and foregoing decisions it is clear that Instructions 8, 9, 12, 13, 14, 15, 16, 17, 18 and 21 are fundamentally erroneous. They submit a Federal Employers' Liability and Safety Appliance case under the common law and interpose the common law defenses of assumed risk and contributory negligence without any distinction. In fact, Instructions 12, 15 and 17, given by the court, impose a greater duty upon the decedent than did the common law he being charged with the duty of exercising care (whether slight, ordinary or extraordinary) to discover extraordinary hazards and dangers created by respondents.

We feel that we have demonstrated that in cases of this character it is not necessary to save exceptions at the trial to the instructions complained of and, of course, if it was not necessary, as we have shown, under the Oklahoma law to save exceptions in cases of fundamental error in order to have a review of the instructions, the petitioner could not be charged with any dereliction of duty in not saving them. As shown above, it is only in cases where an instruction is incomplete or where special instructions are requested that it is necessary to save exceptions in order to have the same reviewed.

The giving of erroneous instructions in connection with correct instructions was treated in the case of *Helsel* v. *Fletcher*, 98 Okla. 285, 225 Pac. 514, in which it quoted with approval from the case of *Payne* v. *Harvester Machine Co.*, 11 Okla. 318, 66 Pac. 287, as follows, to-wit:

> "'While it is a general rule that all of the instructions must be considered as a whole and construed together, and no particular one singled out to the exclusion of another, yet the instructions as

a whole must be consistent and harmonious, and where two instructions contain inconsistent propositions, the cause will be reversed, for the reason that the court is unable to tell which the jury followed and which they ignored.' "

And in the case of *Winn, et al.* v. *Corey,* 179 Okl. 305, 65 Pac. (2d) 522, l. c. 524, this court said:

"It is urged that the general instruction and instruction numbered 6 cured the error, if any, in instruction numbered 4. This same contention was made in *Pittsburg County R. Co.* v. *Hasty, supra,* but was denied. The error of the court in giving instruction numbered 4 was not cured by the general instruction or by giving instruction numbered 6. It does not appear that these instructions relieved defendants of the wrongful burden imposed by instruction numbered 4. Ordinarily erroneous instructions are not cured by the giving of a correct instruction is discussed *infra,* where the cases of *Helsel* v. *Fletcher, Winn, et al.* v. *Corey,* and *Younger* v. *Blanchard Hardware Company,* are cited as authorities."

It will, therefore, be seen that the giving of the abstract instructions Nos. 22, 23 and 24, referred to on page 9 of respondents' brief, does not cure the giving of the fundamentally erroneous instructions. In fact, the giving of abstract instructions, such as these, is condemned by the Supreme Court of Oklahoma, *Green Const. Co.* v. *Empire District Elec. Co.,* 218 Pac. 1074, l. c. 1075. *Miller Bros.* v. *McCall Co.,* 133 Pac. 183. *Miller* v. *Price,* 33 Pac. (2d) 625.

V.

In their discussion of the question of proximate cause respondents have again evaded the issue. The question

was not whether or not proximate cause was submitted to the jury. It is whether or not there was evidence of proximate cause sufficient to submit to the jury. The cases cited by petitioner are neither discussed or distinguished by respondents. As stated in our original petition, the question of proximate cause is ordinarily one for the jury and is seldom taken from the jury and it is, therefore, erroneously held by the Supreme Court of Oklahoma that there was no causal connection between the failure of the coupler to operate and the death of decedent when no intervening cause was shown.

Conclusion.

The brief of respondents does not meet a single issue presented by the petition for writ of certiorari and the brief in support thereof. The whole argument is evasive and not directed at the points raised. Petitioner has shown that it is fundamental error under the practice of Oklahoma for the court not to give of his own motion correct and proper instructions upon the issues made by the pleadings and the evidence, and that it is not necessary to save exceptions to the giving of such instructions.

A similar situation existed in the case of *C. & O. R. Co.* v. *John J. De Atley*, 241 U. S. 310, 36 S. Ct. 564, l. c. 566. In that case it appeared that there was an established rule of practice in Kentucky that if instructions were offered upon any issue respecting which the jury should be instructed and were incorrect in form or substance, it was the duty of the trial court to prepare or direct the preparation of proper instructions upon the point in the place of the defective ones. In this case the court said, l. c. 566:

"Although the present action was based upon a Federal statute, it was triable and tried in a state court; hence local rules of practice and procedure were applicable. *Central Vermont R. Co.* v. *White*, 238 U. S. 507, 511, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865, 9 N.C.C.A. 265; *Minneapolis & St. L. R. Co.* v. *Bombolis*, No. 478, this day decided (241 U. S. 211, 60 L. ed. .., 36 Sup. Ct. Rep. 595). The Kentucky court of appeals assumed for the purposes of the decision that the case was one where the trial court ought to have followed the local practice and prepared or directed the preparation of a proper instruction covering the question of assumption of risk; and it sustained the judgment only upon the ground that there was no question for the jury respecting it. Whether there was is a question of law, and of course, in this case, a Federal question; and *since the court of appeals assumed to decide it, it is incumbent upon us to review the decision.* • • •" (Italics ours.)

The Supreme Court in this case decided that the instructions were not erroneous (210).

The instructions in the De Atley case cannot compare in viciousness with Instructions Nos. 12, 15 and 17, given herein upon the same question. The fact that decedent was not operating the coupler is covered in our original brief, page 45, and is immaterial. The statements on page 17 of respondents' brief that decedent Essary climbed on top of this cut of four cars after they were cut off the train; that he was not on top of them when Morgan pulled the pin; that the four cars had rolled a short distance before Essary got on top of them, is pure fabrication, there not being a scintilla of such evidence in the record, and we challenge respondents to give a single record page citation supporting any such

extravagant statements. In making such statements without the record page citations. respondents are violating paragraph 3 of Rule 27 of this court.

Respondents' comment that the amazing thing about the attack on the instructions is that out of all the instructions given at the trial petitioner excepted to only five. Of course, as petitioner has shown aforesaid, it was not necessary for her to except to instructions which were so plainly and fundamentally erroneous as were the ones in this case. The amazing thing about the case is that any court should have given instructions such as those in this case which these respondents pass by *sub silentio* without any attempt at discussion or the citation of authority in support of the giving of the same.

The statement on page 18 of respondents' brief that all phases of the Safety Appliance Act and Federal Employers' Liability Act were fully covered in the court's instructions and that when considered as a whole there was no error demonstrates the low esteem with which respondents must regard the intelligence of the court.

Respondents refer to the "bunglesome" manner in which decedent was dressed, but under the evidence of their own witness (R. 160) he was dressed in the usual and ordinary raiment of railroad men working under the same or similar circumstances and decedent's widow testified that for years he had dressed similarly for the performance of his duties in inclement weather (R. 124). The testimony of their own witness quoted on page 7 of their brief refutes their contention. In fact, the respondents think so little of this argument that when the court did not submit such facts to the jury for its considera-

tion upon the question of contributory negligence no instruction whatever was offered by the respondents submitting such facts (R. 198-200) and there was not a scintilla of evidence in the record that the manner in which decedent was dressed had a thing to do with him falling from the car and being killed.

Petitioner, therefore, respectfully submits that this court should issue its writ of certiorari to review the judgment of the Supreme Court of Oklahoma and the District Court of Custer County, Oklahoma, to determine whether or not petitioner has been deprived of a federal right under the acts referred to.

CLARENCE C. CHILCOTT,
Counsel for Petitioner

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(14)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 792.

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased, *Petitioner,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, *Respondents.*

PETITION FOR REHEARING AND RECONSIDERATION AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 792.

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased, *Petitioner,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, *Respondents.*

PETITION FOR REHEARING AND RECONSIDERATION.

To the Honorable Supreme Court of the United States:

Comes now the above named petitioner and petitions this Honorable Court for a rehearing of her petition for a writ of certiorari herein filed and a reconsideration of this Honorable Court's order herein under date of January 12, 1942, denying the petitioner a writ of certiorari and for grounds for this petition petitioner states:

I.

That the Supreme Court of the State of Oklahoma is the highest court of the State of Oklahoma in which a decision could be had.

II.

That the said judgment of the Supreme Court of Oklahoma, which petitioner seeks to have reviewed by certiorari, affirming the judgment of the District Court of Custer County, Oklahoma, was entered on June 10, 1941, and is set out verbatim at pages 207-212 of the printed Transcript of Record filed in this court, and that said judgment of affirmance became final when petition for rehearing was denied September 9, 1941, as set out in the Transcript of the Record at page 212.

III.

That the decision of the Supreme Court of Oklahoma is in direct conflict with the decisions of this court, the circuit courts of appeals and of the highest courts of other states.

IV.

That petitioner has been denied a right specifically set up and claimed in her petition (R. 3-9), arising under the Federal Safety Appliance Act, March 2, 1893, c. 149, Sec. 2, 27 Stat. 53 (45 U.S.C.A. Sec. 2), and Federal Employers' Liability Act, April 22, 1908, c. 49, Sections 1 to 8, 35 Stat. 64 (45 U.S.C.A., Sections 51 to 58), by the failure of the District Court of Custer County, Oklahoma, to properly declare the law and the failure of the Supreme Court of the State of Oklahoma to properly apply the law to the facts.

The questions involved herein are substantial in that the Supreme Court of Oklahoma has denied an asserted federal right on the basis of the facts having no support in evidence. *Postal Telegraph Co.* v. *City of Newport*, 247 U. S. 464, 38 S. Ct. 566, 62 L. ed. 1215; *Brady* v. *Terminal R. Ass'n of St. L.*, 303 U. S. 10, 58 S. Ct. Rep. 426, 82 L. ed. 614; *Jenkins* v. *Kurn*, 313 U. S. 256, 61 S. Ct. Rep. 934, 85 L. ed. 1193; *Steeley* v. *Kurn*, second case, 313 U. S. 545, 61 S. Ct. 1087, 85 L. ed. 1511; *Duncan* v. *Thompson*, No. 78, 62 S. Ct. Rep. 422, not yet officially reported.

V.

That the questions, and reasons therefor, entitling petitioner to relief from the judgment entered by the Supreme Court of the State of Oklahoma, through the inadvertence, mistake and oversight of counsel for petitioner, were not presented with sufficient clarity to enable this Honorable Court to grasp their significance.

Your petitioner respectfully submits herewith her brief in support hereof.

SALLIE ESSARY,
Petitioner.

By CLARENCE C. CHILCOTT,
Counsel for Petitioner.

Certificate of Counsel.

Clarence C. Chilcott, Counsel for Petitioner, in the above entitled cause hereby certifies that the above and foregoing petition for rehearing and reconsideration is presented in good faith and not for delay.

Dated at Kansas City, Missouri, this 5th day of February, 1942.

Clarence C. Chilcott,
Counsel for Petitioner.

SUPPORTING BRIEF.

SUMMARY OF ARGUMENT.

I.

The Supreme Court of the State of Oklahoma is the highest court of the state in which a decision could be had.

II.

The judgment rendered by the Supreme Court of Oklahoma in the case of petitioner versus Lowden, et al., was a final judgment.

III.

The decision of the Supreme Court of Oklahoma is in direct conflict with the decisions of this court, the circuit courts of appeals and the highest courts of other states, in holding that:

(a) There was no defect in the coupling device (R. 211);

(b) There was no causal connection between the failure of the coupler to operate and the death of decedent (R. 211);

(c) The instructions given in the case did not work a miscarriage of justice and were not palpably and prejudicially erroneous (R. 211); and

(d) That there was no evidence of jerking or jarring of the car upon which decedent was standing (R. 211).

IV.

That petitioner has been denied a federal right specifically set up and claimed by the failure of the District Court of Custer County, Oklahoma, to properly declare the law and by the failure of the Supreme Court of the State of Oklahoma to properly apply the law to the facts.

ARGUMENT.

I.

That the Supreme Court of the State of Oklahoma is the highest court in which a decision in the case sought to be reviewed could be had is shown by Sections 1 and 2, Article 7, Constitution of the State of Oklahoma, and Sec. 528, Oklahoma Statutes 1931, see Appendix "A." These constitutional and statutory provisions have been construed by the Supreme Court of Oklahoma in the cases of *Robertson* v. *Bozarth, District Judge,* 87 Okla. 102, 209 Pac. 742; *State ex rel. Attorney General* v. *Davenport,* 125 Okla. 1, 256 Pac. 340; *State ex rel. Attorney General Short* v. *Martin,* 125 Okla. 51, 256 Pac. 667, and *Dancy* v. *Owens,* 126 Okla. 37, 258 Pac. 879; and the court, in the latter case, in construing such constitutional and statutory provisions, said, l. c. 822:

> "It must appear clear that there is only one Supreme Court; that all other courts (we do not refer to the state senate as a court; it is not so referred to in the Constitution except when it sits as a court of impeachment) are inferior to the Supreme Court; and that the Supreme Court is given a general superintending control over all."

II.

The said judgment of the Supreme Court of Oklahoma affirming the judgment of the District Court of Custer County, Oklahoma, became a final judgment upon the overruling of petitioner's motion for rehearing which it entertained and passed upon September 9, 1941 (R. 212), *C. G. W. R. Co.* v. *Basham,* 249 U. S. 164, 39 S. Ct. 213, 63 L. ed. 534, as a judgment of affirmance as construed by the Supreme Court of Oklahoma is a final judgment. This was held in the case of *Annis* v. *Bell,* 10 Okla. 647, 64 Pac. 11, l. c. 13, where it said:

> "The action taken in the probate court was but one of the steps necessary to be taken to determine whether she was a creditor or not. The final decision of this was in the hands of the Supreme Court."

Also see the case of *Noble, et al.* v. *Okla. City,* 172 Okla. 181, 44 Pac. (2) 135; certiorari granted 296 U. S. 560, 56 S. Ct. 134, 80 L. ed. 395; reversed and remanded 297 U. S. 481, 56 S. Ct. 562, 80 L. ed. 816. It left nothing to the discretion of the trial court, *Georgia Ry. & Power Co.* v. *Decatur,* 262 U. S. 432, 43 S. Ct. 613, 67 L. ed. 1065. *C. & O.* v. *McCabe,* 213 U. S. 207, 29 S. Ct. 430, 53 L. ed. 765. The trial court was thereby deprived of all jurisdiction to further proceed in the cause and the Supreme Court of the State of Oklahoma had exhausted its jurisdiction.

III.

(a) The Supreme Court of Oklahoma held (R. 212):

> "The evidence wholly fails to show that the coupler operated by Morgan was defective."

This holding is in direct conflict with both federal and state courts, which have construed an inoperative safety appliance (coupler) to be defective within the meaning of the Safety Appliance Act.

Minneapolis & St. L. R. Co. v. *Gotschall,* 240 U. S. 66, 67, 37 S. Ct. 598, 61 L. ed. 995. *Minneapolis, St. P. & Ste. St. Marie R. Co.* v. *Popplar,* 141 N. W. 798; aff. 237 U. S. 369, 370, 35 S. Ct. 609, 59 L. ed. 1000. *C. B. & Q.* v. *U. S.,* 220 U. S. 559, 55 L. ed. 582, 31 S. Ct. 612. *C. R. I. & P.* v. *Brown,* 229 U. S. 317, 320, 33 S. Ct. 840, l. c. 841, 57 L. ed. 1204. *Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497, 505, 36 S. Ct. 683, 60 L. ed. 1125. *Anderson* v. *B. & O. R. Co.,* 89 Fed. (2d) 629, l. c. 630; cert. den. 302 U. S. 696, 50 S. Ct. 14, 82 L. ed. 17. *D. T. & I. R. Co.* v. *Hahn,* 47 Fed. (2d) 59; cert. den. 283 U. S. 842, 51 S. Ct. 489, 75 L. ed. 1452. *Auchenbach* v. *P. & R. R. Co.,* 8 Fed. (2d) 350; cert. den. 273 U. S. 761, 71 L. ed. 878, 47 S. Ct. 476. *Didinger* v. *Penn. R. Co.,* 39 Fed. (2d) 798. *C. & O. R. Co.* v. *Gowen,* 65 Fed. (2d) 260. *P. & R. Co.* v. *Eisenhart,* 280 Fed. 271; cert. den. 260 U. S. 723, 43 S. Ct. 13, 67 L. ed. 482. *Anderson* v. *C. & O.,* 263 Ill. App. 609; aff. 186 N. E. 185, l. c. 187; cert. den. 290 U. S. 675, 54 S. Ct. 93, 78 L. ed. 583. *Stewart* v. *Walsh,* 182 N. W. 496; cert. den. 257 U. S. 641, 42 S. Ct. 52, 66 L. ed. 412. *Davis* v. *Minneapolis & St. L. R. Co.,* 159 N. W. 802; cert. den. 242 U. S. 650, 37 S. Ct. 243, 61 L. ed. 545. *C. I. & L. R. Co.* v. *Stierwalt,* 153 N. E. 807; cert. den. 278 U. S. 633, 49 S. Ct. 32, 78 L. ed. 551. *Talbert* v. *C., R. I. & P. Ry. Co.,* 284 S.

W. 499. *Talbert* v. *C., R. I. & P. Ry. Co.*, 15 S. W. (2d) 762; cert. den. 280 U. S. 567, 50 S. Ct. 26, 74 L. ed. 621. *McAllister* v. *St. L. Merchants' B. T. Ry. Co.*, 25 S. W. (2d) 791. *Henry* v. *C. C. L. & St. L. R. Co.*, 332 Mo. 1072, 61 S. W. (2d) 340, l. c. 341. *Kimberling* v. *Wabash*, 337 Mo. 702, 85 S. W. (2d) 736, l. c. 738. *Wilson* v. *Thompson*, 345 Mo. 311, 133 S. W. (2d) 331.

(b) The Supreme Court further stated (R. 211):

> "There is in the record no evidence • • • tending to show that anything connected with that operation (failure of the coupler to work) could have occasioned or contributed to the fall of Essary from the car."

This holding of the Supreme Court of Oklahoma is in direct conflict with the cases of *Choctaw* v. *McDade*, 191 U. S. 64, 48 L. ed. 96, 24 S. Ct. 24; *Myers* v. *Pittsburg Coal Co.*, 233 U. S. 184, 34 S. Ct. 559, 58 L. ed. 906; *N. Y. C. R. Co.* v. *Marcone*, 281 U. S. 345, 50 S. Ct. 294, 74 L. ed. 892; *B. & P. Ry. Co.* v. *Landringhan*, 191 U. S. 461, 24 S. Ct. 137, 48 L. ed. 262.

In all of these cases the evidence of proximate cause connecting the negligence or defect with an injury or death was far less satisfactory than herein, yet this court permitted a recovery. The subject of proximate cause is treated fully under Point III of petitioner's original brief, pages 23 to 42, and the court is respectfully referred thereto for additional cases in conflict with the holding of the Supreme Court of Oklahoma.

(c) The Supreme Court of Oklahoma held (R. 211) that "while the instructions in the instant case were * * * in many respects conflicting and confusing" that they sufficiently advised the jury the correct principles of law to be applied to the facts in the case, see Point IV, pages 42 to 47 of original brief.

While this subject was not treated exhaustively in petitioner's original brief, petitioner believes that sufficient is shown for this court to declare that petitioner was deprived of her rights under the Federal Safety Appliance and Employers' Liability Acts by the instructions of the court.

From a reading of these instructions a lawyer could not glean the law, much less a layman, and under them it is absolutely impossible for a jury to know what the law is, what law to apply to the facts or how to apply it, and the giving of these instructions defeated the purpose of the Safety Appliance and Employers' Liability Acts.

The Supreme Court of Oklahoma in this case admitted that the instructions were conflicting and confusing and a cursory reading of the same demonstrates they were misleading and improper and that plaintiff's claimed deprivation of a federal right is not frivolous, but substantial. *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 35 S. Ct. 481, 59 L. ed. 777.

This court will review on certiorari and reverse and remand a cause where the instructions submitted a wrong standard of liability. *B. & O.* v. *Groeger*, 226 U. S. 251, 45 S. Ct. 169, 69 L. ed. 419. In this case the court informed the jury that the respondent could rely upon the common law defenses of contributory negligence and as-

sumed risk which brings the case within the purview of this court and is reversible error. *So. Ry. Co.* v. *Crockett*, 234 U. S. 725, 34 S. Ct. 897, 58 L. ed. 1564; *C. & O. Ry. Co.* v. *John J. D'Atley*, 241 U. S. 310, 36 S. Ct. 564, 60 L. ed. 1016.

(d) The Supreme Court of Oklahoma held that (R. 211):

> "Assuming that the jury might reasonably draw from the evidence an inference that the coupler was defective, they must go further and infer that the defect in the coupler caused a jerking or jarring of the car upon which Essary was standing and that such jerking or jarring of the car caused or contributed to his fall. This would be pure conjecture or speculation and is not permissible."

Petitioner submits that such are not the facts and that the circumstantial evidence shows that a jerk or jar would be caused by the stoppage of the cars sufficient to throw a man not expecting it therefrom. However, there is direct evidence that such stoppage would cause a jerk or a jar sufficient to throw a man therefrom, which was testified to by witnesses Harrell (R. 83, 88) and Dodd (R. 108), and such expert testimony is substantial, see cases cited on page 25 of our original brief and the cases of *Gila Valley Globe & N. Ry. Co.* v. *A. J. Lyon*, 203 U. S. 465, 27 S. Ct. 145, 51 L. ed. 276; *Eugene C. Kreigh* v. *Westinghouse, C. K. & Co.*, 214 U. S. 249, 29 S. Ct. 619, 53 L. ed. 984. Furthermore, the Supreme Court of the State of Oklahoma takes judicial notice that the stopping of a freight train is attended with more or less of a jerk or jar. *M. K. T.* v. *Taylor*, 170 Pac. 1148, l. c. 1151.

Morgan testified (R. 166) that he made arrangements with decedent to shunt the cars down the main line. "Shunt" according to Webster's International Dictionary, means "to cause to move suddenly; to give a sudden start; to shove." It is common knowledge that when switchmen shunt a cut of cars they start the movement, stop the engine and cut off the cars, and to say there would be no stoppage sufficient to cause a man not expecting it to lose his balance and fall off the cars if they were not cut off and instead stopped with the rest of the train, would be flying in the face of physical facts.

It must, necessarily, therefore, be concluded that no inference was piled upon inference and that there was no hiatus between the cause and effect in this case.

SUMMATION.

In the case of *N. Y. C. R. Co.* v. *Winfield,* 244 U. S. 147, 37 S. Ct. 546, this court said, l. c. 547:

> "And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states. House Report No. 1386 and Senate Report No. 460, 60th Cong., 1st Sess. Thus, in the House Report it is said: 'It (the bill) is intended in its scope to cover all commerce to which the regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees . . . A Federal statute of this character will supplant the

numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the states.' "

This court will grant certiorari where it appears that there is a conflict of decisions between a federal court and a state court, *Tipton* v. *A. T. & S. F.*, 298 U. S. 141, 56 S. Ct. Rep. 715, 80 L. ed. 1091; *Palmer Clay Products Co.* v. *Brown*, 297 U. S. 227, 56 S. Ct. 450, 80 L. ed. 655.

To resolve a conflict between two circuit courts of appeals, *Wayne United Gas Co.* v. *Owen Ill. Glass Co.*, 300 U. S. 29, 57 S. Ct. Rep. 382, 81 L. ed. 557.

Where improper instructions were given, *B. & O.* v. *Groeger*, 226 U. S. 251, 45 S. Ct. 169, 69 L. ed. 419.

The fact that a federal right has been denied by a state court is sufficient to invoke the jurisdiction of the Supreme Court of the United States, *St. L. S. F. & T. R. Co.* v. *Seale*, 229 U. S. 156, 33 S. Ct. 651, 57 L. ed. 1129.

Where the state court denied asserted federal rights on a basis of fact having no support in the record, a finding of fact by the state court is not conclusive on this court and it should review and correct the error, *Postal Telegraph & C. Co.* v. *City of Newport, Ky.*, 247 U. S. 464, 38 S. Ct. 566, 62 L. ed. 1215.

This court is not bound by finding in a state court contrary to uncontradicted evidence, *B. & O. Southwestern* v. *Burtch*, 263 U. S. 540, 44 S. Ct. 165, 68 L. ed. 433. In the case of *N. Y. C.* v. *Marcone*, 281 U. S. 345, 50 S.

Ct. 294, 74 L. ed. 892, this court allowed a writ of certiorari on the ground that the court below had erroneously decided there was evidence that at the time of the accident deceased was engaged in interstate commerce; that there was evidence of negligence on the part of petitioner and that deceased's death was not due to his own negligence.

In a number of recent cases this court has held that it will issue its writ of certiorari to review the evidence and determine whether or not a federal right has been denied by a misinterpretation of or wrong conclusion drawn from the evidence, *A. T. & S. F.* v. *Saxon*, 284 U. S. 458, 52 S. Ct. 229, 76 L. ed. 397. *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. ed. 743. *Jamison et al* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, l. c. 443, and this court will take jurisdiction on certiorari and review the evidence where the conclusion drawn by the highest state court would deprive a litigant of a federal right, *Brady* v. *Terminal R. Ass'n of St. L.*, 303 U. S. 10, 58 S. Ct. 426, 82 L. ed. 614, and will go behind the decision of a state court holding that the asserted federal right has no basis in point of fact. Otherwise it would almost always be within the power of a state court practically to prevent a review by this court, *Truax* v. *Corrigan, et al.*, 257 U. S. 312, 42 S. Ct. 124, 66 L. ed. 254. That is what the Supreme Court of Oklahoma has done in this case.

Unless the evidence is such that a court would be bound to set aside a verdict returned in opposition to it the evidence must be submitted to the jury for its consideration, *Marande* v. *T. & P. Ry. Co.*, 184 U. S. 173, 22 S. Ct. 340, 46 L. ed. 487. There was certainly sufficient evidence in this case to have sustained a verdict for petitioner had the jury returned a verdict for her.

In three recent cases this court has issued its writs of certiorari because the conclusions of the highest court of the state would deprive a litigant of a federal right under the Federal Employers' Liability Act. They are the cases of *Jenkins* v. *Kurn*, 313 U. S. 256, 61 S. Ct. 934, *Steeley* v. *Kurn*, 313 U. S. 545, 61 S. Ct. 1087 (reviewed without opinion upon the granting of the writ upon the authority of *Jamison et al.* v. *Encarnacion, supra*), and on the very day that this court denied the petition herein for a writ of certiorari this court decided the case of *Duncan* v. *Thompson*, 62 S. Ct. 442, not yet officially reported.

Conclusion.

It must be manifest that the decedent herein was killed as the result of one of two things for both of which the respondent would be liable, to-wit, either the switch foreman Morgan could not pull the pin by reason of an inoperative coupler, or he was negligent in giving a stop signal at a time when it was impossible to pull the pin and cut off the cars upon which decedent was riding. If the latter is the fact, then the case of *Ward* v. *C. R. I. & P.*, 68 Okla. 91, 173 Pac. 212; aff. 252 U. S. 18, 40 S. Ct. 275, 64 L. ed. 43, applies. If such is not the case and he was killed as the result of an inoperative coupler then the cases cited under Point III(a) do apply.

The question involved herein is quite similar to that involved in the case of *Brady* v. *Terminal Railroad Ass'n of St. Louis, supra*, where the Missouri Supreme Court denied the plaintiff a recovery against one railroad upon one ground, see *Brady* v. *Wabash*, 49 S. W. (2d) 24, and against the other railroad upon another ground, *Brady* v. *Terminal R. Ass'n of St. Louis*, 102 S.

W. (2d) 902, 903, thereby depriving the plaintiff, who was a railway employee operating under the Safety Appliance and Federal Employers' Liability Acts, of a recovery against either railroad and this court granted its writ of certiorari "in view of the importance of the question in the administration of the federal statute," 303 U. S. 10, 58 S. Ct. Rep. 426.

A similar question was involved in the cases of *Jenkins* v. *Kurn*, 313 U. S. 256, 61 S. Ct. 934, 85 L. ed. 851, which was reversed outright by the Supreme Court of Missouri, 144 S. W. (2d) 76, and *Kurn et al., Trustees* v. *Reece*, decided by the Supreme Court of Oklahoma, a copy of which opinion appears at page 30 of the petition for writ of certiorari in the Jenkins case. Reece was killed and Jenkins was severely injured in the same wreck. Reece's administratrix recovered and the judgment was affirmed and the Supreme Court of Missouri denied a recovery to Jenkins, and this court issued its writ of certiorari, Case No. 1, 312 U. S. 675, 61 S. Ct. Rep. 740, 85 L. ed. 1116, and reversed the Supreme Court of Missouri, 313 U. S. 256, 61 S. Ct. 934, 85 L. ed. 1316.

In Appendix "B" herein attached will be found the material testimony of the witnesses concerning the casualty in which petitioner's husband lost his life. There is not a scintilla of evidence of contributory negligence or assumed risk in the record. Any way the evidence is viewed decedent lost his life as the result of a breach of duty of the respondents or their employees, and, as stated in the case of Jamison, *et al.* vs. Encarnacion, unquestionably petitioner would be liable, as has been held by the Supreme Court of Oklahoma and this court (*C. R. I. & P.* v. *Ward*, 68 Okla. 91, 173 P. 212, aff. 252 U. S. 18, 40 S. Ct. 275, 64 L. ed. 43), if decedent's death had been

caused by mere inadvertence or carelessness upon the part of the offending foreman it would be more unreasonable and in conflict with the purpose of Congress to hold that respondent herein would not be liable for the much graver breach of duty in furnishing an inoperative coupler, when it would be liable for the mere negligence of the foreman as held in the Ward case.

Morgan had worked continuously as a railroad man for 44 years and for the defendants at Clinton for 10 years (R. 60-61), and to say that a man of his experience in charge of a switching crew would know when to pull the pin is unquestionable, *Philadelphia & R. Ry. Co.* v. *McKibbin*, 259 F. 476, l. c. 478, 479.

In this case the Supreme Court of Oklahoma went out of its way to make an alleged finding of fact for the purpose of declining to review the instructions which deprived the petitioner of a federal right. But this was improper, as held in the case of *Penn. R. Co.* v. *Jones*, 300 Fed. 525, l. c. 529:

> "We cannot assume something not conclusively shown by the record in order to conclude there was no prejudice from an erroneous instruction."

In fact, it is very doubtful if under the constitution, statutes (see Appendix A) and decided cases the Supreme Court of Oklahoma had any authority to make such an alleged finding of fact under the circumstances herein. It appears to be held that it has not. See *Shawnee Mutual Fire Ins. Co.* v. *School Board of School District No. 31, Grady County*, 44 Okla. 3, 143 Pac. 194, l. c. 195. *McDonald* v. *Strawn*, 78 Okla. 271, 190 Pac. 558.

It is, therefore, respectfully prayed that the order of this Honorable Court entered on the twelfth day of January, 1942, denying petitioner's petition for a writ of certiorari be vacated and that her petition for rehearing and reconsideration be sustained and the writ granted.

Respectfully submitted,

CLARENCE C. CHILCOTT,
Counsel for Petitioner.

APPENDIX A.

Sections 1 and 2, Article 7, Constitution of the State of Oklahoma:

Section 1: "The judicial power of this state shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law."

Section 2: "The appellate jurisdiction of the Supreme Court shall be coextensive with the state, and shall extend to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, *quo warranto*, certiorari, prohibition, and such other remedial writs, as may be provided by law, and to hear and determine the same; and the Supreme Court may exercise such other and further jurisdiction as may be conferred upon it by law.

"Each of the justices shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and make such writs returnable before himself, or before the Supreme Court, or before any district court, or judge thereof, in the state."

Section 528, Oklahoma Statutes, 1931:

"528. Supreme Court—Appellate Jurisdiction—Review on Merits—Review of Orders.

The Supreme Court may reverse, vacate or modify judgments of the county, superior or district court, for errors appearing on the record, and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. The Supreme Court may also reverse, vacate or modify any of the following orders of the county, superior or district court, or a judge thereof:

First. A final order.

Second. An order that grants or refuses a continuance; discharges, vacates or modifies a provisional remedy; or grants, refuses, vacates, or modifies an injunction; that grants or refuses a new trial; or confirms or refuses to confirm, the report of a referee; or sustains or overrules a demurrer.

Third. An order that involves the merits of an action, or some part thereof."

APPENDIX B.

Testimony of Various Witnesses:

EVAN E. MORGAN:

Direct Examination by Mr. Suits.

"Q. When did you commence railroading?

A. Well, let's see. It has been a long time ago. 1893.

Q. And you have been railroading continuously since that time?

A. Well, not continuously, but every time I had employment.

• • •

Q. Now, how long had you worked at Clinton before you retired?

A. Since 1927.

Q. Now, what kind of work were you doing at Clinton?

A. Well, it is what they call engine foreman (R. 60).

Q. As engine foreman do you have a crew under your supervision?

A. Yes, sir (R. 61).

• • •

A. I kept walking on till I came to where the cut was, the four cars, and I reached in on that lever with my hand, which would ordinarily be the proper thing to do, but I come to find out I couldn't trip that pin lifter with my hand. I wasn't heavy enough.

Q. Did you apply enough force to trip it?

A. Well, in ordinary cases, there was enough force applied, yes, sir.

Q. Well, go ahead and tell us why it wouldn't work for you.

A. I *think* the engineer saw I was just getting ready to trip the pin and he applied the brake a fraction of a second too soon and the slack had run out, and it was impossible to pull the pin, so then I got up on the car, this fourth car, I got up on there and put my foot on the lever and give him the sign to give me some slack, a little bit, and he give me the slack.

Q. Now, then, when you put your foot on it, it did work?

A. Yes, sir (R. 63).

Q. And when you reached the point opposite the end of these four cars, did you give him any further signal?

A. Gave him the sign to stop just as I took hold of the lever to trip it.

Q. Did you give him the sign to stop before you took hold of—lever?

A. I saw just as I went to take hold of the lever, I gave him the stop sign and took hold of the lever?

Q. Then if you took hold of the lever just as you gave him the signal to stop, there wasn't any reason why the coupler should not have worked?

A. No, not that I know of, unless like I said, he had previous to that time, had possibly applied the brake, just enough to take the slack out.

* * *

Q. Well, had he had any signal from you to let the slack run out before you gave him that signal?

A. No, sir (R. 64).

Q. Now, Mr. Morgan, you say now that you gave the signal and you reached in at the same time to uncouple the cars?

A. Yes, sir.

Q. And this coupler wouldn't work?

A. No.

Q. You put pressure enough on it to work under ordinary conditions?

A. Yes, sir.

* * *

Q. When you pressed down on the lever did it release the pin?

A. No, if it had the car would have uncoupled (R. 65).

* * *

Q. Did you try more than once with your hand to uncouple it?

A. Yes. Just, you know, how a man will do, or try to do anything like that. Maybe I tried it a couple of times, or maybe three.

* * *

Q. Are there any other makes of couplers, where you have found it necessary to use your foot in uncoupling cars?

A. That's the only one I know of.

Q. All of the other couplers you can use your hand?

A. Yes, sir. You can use your hand on this coupler. You can use your hand if you are heavy enough.

Q. Well, you have been railroading a long time, haven't you?

A. Yes, sir (R. 66).

Q. And you have been heavy enough over all these years to perform your work well, haven't you?

A. Yes, sir.

* * *

Q. Had you ever found it necessary to use your foot before, in cars with this particular coupler?

A. Yes, many times (R. 67).

* * *

Q. Now then, Mr. Morgan, the second time when you finally uncoupled it with your foot, if you had given him the signal to give you a little slack, could you have uncoupled with your hands?

A. No, I don't think I could, the way the ground was there and all (R. 76).

Direct Examination by Mr. Farmer.

Q. And you further said that after making arrangements with Mr. Essary for him to take care of the four cars that you expected to *shunt* down the main line, that you walked in a southerly direction about three car lengths and signalled the back up signal?

A. Yes, sir (R. 166).

RAYMOND C. HARRELL:

Direct Examination by Mr. Suits.

Q. What in your judgment would be the amount of slack in a string of 14 cars, if the slack was permitted to run out of all these cars?

• • •

A. Well, that would give you, the extreme slack in the 14 cars would be anywhere from seven foot to twelve foot. I would say not less than seven foot (R. 83).

Q. What effect would 7 to 13 feet of slack running out of 14 cars have upon a man on top of the front car, not expecting any such a jolt or jar as that?

Mr. Grigsby: We object to that as incompetent, irrelevant and immaterial.

By the Court: Sustained.

Q. Well, would the slack running out of 14 cars be sufficient to throw a man from the top of the front car,

if he was not expecting the slack to run out?

* * *

A. It would.

Q. State, in your judgment, if the force of that would be sufficient to throw a man off of the top of the car?

A. It could be (R. 88).

HOWARD DODD:

Direct Examination by Mr. Suits.

Q. Now, Mr. Dodd, if a man was on top of the end of those cars for the purpose of braking them down when they had been uncoupled, if the uncoupling of the four cars failed for any reason and the slack on the 14 cars run out, state whether or not, in the range of your experience and based upon your judgment, there would be sufficient jerk in the running out of the slack to throw a man off the top of those cars?

* * *

A. Yes, if he wasn't expecting the slack to, it could do it (R. 108).

W. T. SNOWDEN:

Direct Examination by Mr. Farmer.

Q. Mr. Snowden, does an engineer ever release his brakes and permit his train to roll back without receiving a signal?

A. No, sir.

Q. Why?

A. Because it is very dangerous to make a movement without a signal.

* * *

Q. It would have been poor railroading to back up without a signal? (R. 175.)

A. The man that was running the engine wouldn't have backed up without a signal.

Q. Would he release the brakes and permit his cars to roll down without a signal?

A. No, sir (R. 176).

Q. Well, if the slack all run out, when the engineer released his brakes and started to roll down there, you couldn't uncouple the cars?

A. The engine will start rolling first. That was shoving the cars down.

Q. That was shoving the cars down?

A. Yes.

Q. In uncoupling, you uncouple the cars?

A. Yes, sir.

Q. This slack don't run out?

A. Not when you start to roll back.

Q. The slack runs out when the engine stops?

A. When the brakes are applied.

Q. Now, when that train came to a stop there, it must have received a signal to stop?

A. Yes.

Q. When the engineer applied his brakes and commenced to stop the engine, this slack would commence to run out in these other cars, wouldn't it?

A. Yes.

Q. And the slack must have run out because he stopped and then started over, didn't he?

A. Yes, sir.

Q. That's all (R. 177).

FRANK FAST:

Cross Examination by Mr. Suits.

Q. Did you permit your train that day, or any part of it, to roll back without any signal from Mr. Morgan?

A. No, sir.

Q. Are you sure about that?

A. Yes, sir.

Q. Do engineers ever permit, in yards like you were working in, the train to move without first receiving a signal?

A. Never.

Q. Why?

A. It is against the rules.

Q. Why is it against the rules, do you know?

A. Well, it is a safety rule.

Q. Well, it is dangerous, isn't it?

A. Yes (R. 179).

Q. And when you started back there, the engine would shove the other cars, wouldn't it, as you started back?

A. Yes (R. 180).

SUPREME COURT OF THE UNITED STATES,

October Term, 1941

SALLIE KEARNY, Executrix of the Estate of William H. Kearny, Deceased,

Petitioner,

vs.

No. 792

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; and J. W. KURN and JOHN S. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF OUT OF TIME

Comes now the above named petitioner and asks leave and permission of this Honorable Court to file her petition for rehearing and reconsideration and brief in support thereof out of time for the following reasons, to-wit:

Because said petition was not filed in due time on account of any intention, negligence or inadvertence of petitioner or her counsel but because of reasons wholly beyond the power or control of either; that a package containing forty copies of said petition were delivered to the Air Express Division of the Railway Express Agency, Inc., at Kansas City, Missouri, at 6:08 o'clock P. M. on Thursday February 5th, 1942, and left Kansas City at 9:20 P. M., by airplane, Flight No. 2, Transcontinental & Western Air, Inc., and should have arrived in Washington, D. C., at 5:20 A. M. and been delivered to the Clerk of the Supreme Court by 9:00 A. M. Friday February 6th, 1942, in due time, but that for some reason unknown to this petitioner, said package containing said forty copies of said petition did not arrive in Washington to be delivered on Friday, February 6th, in the usual course of business, and petitioner attaches hereto as an exhibit the original Uniform Express Receipt received at the time said package was delivered to said Railway Express Agency, Inc. for transportation.

Petitioner further states that forty copies of said petition and brief in support thereof have now been received and are in the hands of the Clerk of this Honorable Court.

WHEREFORE, petitioner prays this Honorable Court for leave and permission to file said petition for rehearing and reconsideration and brief in support thereof out of time as of the date when said petition and brief were actually received by Hon. Charles Elmore Cropley, Clerk of this Honorable Court, or such other time as the Court may designate.

BAILIE BOGART, Petitioner,
By _____
Counsel for Petitioner.

STATE OF MISSOURI,
) ss.
COUNTY OF JACKSON.)

Clarence S. Chilcott, of lawful age, being first duly sworn, upon his oath deposeth and saith that he has read the above and foregoing motion for permission to file petition for rehearing and reconsideration and brief in support thereof, and states that the contents thereof are true to his best knowledge and belief.

_____

Subscribed and sworn to before me this 11th day of February, 1943.

My commission expires: June 8, 1945.

_____
Notary Public, Jackson County, Missouri.